Significant Decisions Headnotes

ABATEMENT (RCW 51.32.040)

Where the widow died leaving no surviving beneficiaries after the Board had granted the Department's petition for review from a proposed decision and order granting the widow a pension, but before the Board had issued its decision and order, the widow's accrued pension benefits were not payable to her estate. **....Johanna Hoerner, Dec'd., 70,575 (1986)** [*Editor's Note*: Consider the affect of 1999 Legislative changes to RCW 51.52.040 which make accrued benefits payable to the estate. The Board's decision was appealed to superior court under Benton County Cause No. 86-2-00646-7.]

Where the worker died leaving no surviving beneficiaries after the proposed decision and order granting him a pension had been issued, but before it had been adopted by the Board, the worker's accrued pension benefits were not payable to his estate. **....Leo Gilmore, Dec'd., 57,759 (1981)** [*Editor's Note:* Consider the affect of 1999 Legislative changes to RCW 51.52.040 which make accrued benefits payable to the estate.]

At the time of the worker's death no specific disability rating had been communicated to the Department but all the evidence necessary to rate disability was available through the attending physician, who had found the worker's condition fixed and ratable prior to the worker's death. The Department should have secured such evidence and, if disability was found, paid the award therefore to the surviving beneficiary. **....Bernard Nickolai, Dec'd., 38,266 (1971)**

ABUSE OF DISCRETION

(See AGGRAVATION, MEDICAL BILLS, SCOPE OF REVIEW, STANDARD OF REVIEW, THIRD PARTY ACTIONS and VOCATIONAL REHABILITATION)

ACCIDENT REPORT

(See APPLICATION FOR BENEFITS)

AGGRAVATION (RCW 51.32.160)

(See also APPLICATION TO REOPEN CLAIM, DIMINUTION OF DISABILITY, OCCUPATIONAL DISEASE, PERMANENT PARTIAL DISABILITY, PERMANENT TOTAL DISABILITY, RES JUDICATA, RETROACTIVITY OF STATUTORY AMENDMENTS, SUBSEQUENT CONDITION TRACEABLE TO ORIGINAL INJURY and TIMELINESS OF APPLICATION TO REOPEN CLAIM)

Applicability of 1988 amendments

The 1988 amendments to RCW 51.32.160 were remedial in nature and apply to any application to reopen a claim filed subsequent to the effective date of the amendments, June 9, 1988. **....Marven Sandven, 89 3338 (1990)** [*Editor's Note: See Campos v. Department of Labor & Indus*., 75 Wn. App. 379 (1994) determining that amendment's seven-year limitation does not violate equal protection.]

"Deemed granted" application to reopen claim

After the Department places in abeyance the terms of an order that extends the time in which to act on an application to reopen the claim, the time to act is no longer extended. The application to reopen must be deemed granted if not acted on or again extended within 90 days of receipt of the application as required by RCW 51.52.060(4). **….Ingrid Evanoff, 08 18344 (2008)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 08-2-02400-5.]

The employer's ability under RCW 51.52.060(5) to appeal a deemed-granted application to reopen on the merits does not create a comparable ability to protest a deemed-granted application to reopen. **....Stephen Murphy, 02 12603 (2003)**

The 1995 amendment to RCW 51.52.060 reduced the time the Department has to place in abeyance the terms of orders involving applications to reopen claims. If an application to reopen is filed before the effective date, the statutory changes do not apply to the application to reopen. Additionally, even if the 1995 amendments could be applied, the failure of the Department to act within the proscribed time period will not result in the application being "deemed granted." **....Elois Short, 95 4522 (1996)** [dissent]

When there has been an appeal of an order closing the claim and an application to reopen filed while the appeal is pending, the Department has 90 days from the final order of the Board or Court to issue an order on the application or the application will be deemed granted. The Department should not act upon an application to reopen the claim when the appeal from the claim closure is still pending in light of *Reid v. Department of Labor & Indus.*, 1 Wn.2d 430 (1939). *Distinguishing Marley v. Department of Labor & Indus*, 125 Wn.2d 533 (1995). **....Greg Ackerson, 94 1135 (1995)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Whatcom County Cause No. 95-2-00808-5. The Board has partially overruled this decision to the extent the decision relies on the concept of subject matter jurisdiction. *In re Betty Wilson* BIIA Dec., 02 21517 (2004), *In re Jorge Perez-Rodriquez* BIIA Dec., 06 18718 (2008)]

Where the Department received a copy of a Superior Court judgment regarding the appeal of the last order closing the claim and the time for acting on the application to reopen the claim has passed, resulting in the application being deemed granted, the consequence is that the claim is considered to have been reopened for temporary worsening or aggravation--the worker must still prove entitlement to further benefits. **....Margaret Casey, 90 5286 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 92-2-04909-6.]

The Department's failure to respond to a physician's submission of office notes recommending further treatment within the time prescribed by RCW 51.32.160, the application to reopen is deemed granted, notwithstanding the provisions of WAC 296-14-400. WAC 296-14-400 is invalid to the extent it is an attempt to delay the running of the 90-day period within which the Department is required to act following the filing of an application to reopen a claim for aggravation of condition.
....Wallace Hansen, 90 1429 (1991) [*Cf. Tollycraft Yachts v. McCoy*, 122 Wn.2d 426, 433 (1993)]

An order extending the time in which the Department must act on an application to reopen the claim must be entered before the initial time allowed by RCW 51.32.160 has passed. An order purporting to further extend the time, entered after the first extension period has passed, is ineffective, since at the time such order was entered the application to reopen the claim had already been "deemed granted" by operation of RCW 51.32.160. **....Edwin Fiedler, 90 1680 (1990)**

Where the last order closing the claim has been appealed and is not yet final the Department is not under any obligation to act upon a subsequent application to reopen the claim until a final order has been entered by either the Board or the Court, as the case may be. Under the circumstances of this case the time within which the Department had to act on the application to reopen the claim could not begin any sooner than the date upon which the Department received a conformed copy of the Superior Court's Stipulated Order of Dismissal. *Reid v. Department of Labor & Indus*., 1 Wn.2d 430 (1940). **....Edwin Fiedler, 90 1680 (1990)** [Consider impact, if any, of *Marley v. Department of Labor & Indus*., 125 Wn.2d 533 (1995) *See In re Greg Ackerson*, BIIA Dec., 941135 (1995)]

The Department may not deny an application to reopen a claim and then promptly enter an abeyance order, on its own motion pursuant to RCW 51.52.060, thereby attempting to give itself up to 180 additional days to act on the application. To allow such action would render the time limitations of RCW 51.32.160 completely illusory. Where the Department has entered such an abeyance order but has not made a final decision to deny the application within the time allowed by RCW 51.32.160, the application to reopen the claim is deemed granted. **....John Aitchison, 90 4447 (1990); Donald Schroeder, 90 3177 (1990); Virginia Watts, 90 3816 (1990)** [*Rule reversed by Tollycraft Yachts v. McCoy*, 122 Wn.2d 426 (1993)]

The provisions of RCW 51.32.160, as amended in 1988, which render an application to reopen a claim "deemed granted" if an order denying the application is not issued within 90 days of receipt of the application, do not apply where the Department denied the application within the time allowed but, following the filing of an appeal, reassumed jurisdiction over the claim and held its order denying the application in abeyance. **....Edna Shore, 89 5898 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Clallam County Cause No. 91-2-00740-6.]

Discretionary reopening by Director

In an appeal of Director's letter refusing to waive the time limit for filing an application to reopen the claim, the standard of review is whether the decision not to waive the time limit constitutes an "abuse of discretion." **....Ernest Therriault, 90 0876 (1990)**

The Director has discretion to waive the seven year limitation for filing an application to reopen a claim provided there are sufficient facts to support a finding that an aggravation of disability has occurred. The required factual basis is not within the determination vested in the discretion of the Director and the Board therefore has jurisdiction to decide whether the worker's condition worsened between the terminal dates. **....Merle Fugate, 86 1526 (1987)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 87-2-22610-7.]

Once the Director exercises the discretion to reopen a claim which otherwise could not be reopened due to the time limitations of RCW 51.32.160, the worker is entitled to benefits under the Act to the same extent as if there had been no time limitation bar. **....Bernard James, 04,394 (1955)** [See later statutory amendments, Laws of 1988, ch. 161, § 11]

Effect of abeyance order on "deemed granted" provisions (RCW 51.32.160)

The prohibition contained in RCW 51.52.060(4) that precludes the Department from issuing an order holding in abeyance the terms of an order issued pursuant to RCW 51.32.160 does not apply when the Department has been requested to reconsider the order under the authority of RCW 51.52.050. **....Joseph Brown, 96 4577 (1996)**

RCW 51.52.060(4) as amended in 1995 prohibits the Department from issuing an order that holds in abeyance the terms of an order issued under RCW 51.32.160 when more than 90 days have passed since an application to reopen has been filed. **....Nancy Stumbaugh, 95 7068 (1996)**

Where the Department elects to hold an order in abeyance pursuant to RCW 51.52.060, not in response to a protest or an appeal, the time limitations for action set forth in RCW 51.32.160 still apply. **....Clyde McCoy, 91 0701 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Cowlitz County Cause No. 91-2-00373.]

Extension of time to act on application to reopen claim

An order extending the time in which the Department must act on an application to reopen the claim must be entered before the initial time allowed by RCW 51.32.160 has passed. An order purporting to further extend the time, entered after the first extension period has passed, is ineffective, since at the time such order was entered the application to reopen the claim had already been "deemed granted" by operation of RCW 51.32.160. **....Edwin Fiedler, 90 1680 (1990)**

An order extending the time for acting on an application to reopen the claim which is not timely appealed is final and binding and has res judicata effect. Worker cannot collaterally attack the unappealed extension decision in a later appeal of an order denying reopening of the claim. **....Clara Morton, 89 5897 (1990)**

First closure based on medical recommendation

Under the 1988 amendments to RCW 51.32.160, closing orders which were issued prior to July 1, 1981 need not be based on medical recommendation, advice or examination in order to serve as the starting point for the seven year period in which the worker is entitled, as a matter of right, to apply to have the claim reopened for payment of additional disability benefits. **....Marven Sandven, 89 3338 (1990) ; Mike Streubel, 89 4867 (1990)**

First terminal date: effect of Board's determination of effective date of closure

A Department order issued in response to an Order Adopting Proposed Decision and Order is a ministerial order and the effective date of the closure of the claim is the effective date recited in the Board's order. It is not the date of the Order Adopting Proposed Decision and Order. **….Donald Workman, 00 24102 (2001)**

First terminal date: effect of subsequent ministerial order

The issuance of a Department order pursuant to the terms of a Board Order on Agreement of Parties is merely a ministerial act. It does not adjudicate the merits of the claim beyond the date of the Department order which was the subject of the Board order. Therefore, the date of the Department order appealed, and not the date of the subsequent ministerial order, is the first terminal date of subsequent aggravation period. (*Karniss v. Department of Labor & Indus.,* 39 Wn.2d 898 (1952)). **....Jimmy Storer, 86 4436 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Stevens County Cause No. 88-2-00328-7.]

First terminal date findings

An Order on Agreement of Parties on the first terminal date, based on an examination by a particular physician, establishes the findings which must serve as the basis of comparison to determine if worsening has occurred between the terminal dates. **....John Jensen (I), 16,316 (1964)**

Last closing order not final

After the Department's decision to reopen the claim for aggravation becomes final, even if based on a mistake of law, the decision defeats any argument relating to the finality of the prior closing order and the reopening order sets the date upon which further benefits can be considered. **….Christopher Preiser, 09 19683 (2010)** [dissent]
[Editor's Note: The Board's decision was appealed to superior court under Snohomish County Cause No. 10-2-09709-9.]

The Department's failure to properly close a claim before denial of an application to reopen a claim is not jurisdictional; the failure is an error of law and the subsequent denial of an application to reopen that becomes final is res judicata that the claim is closed as of the date of that denial. **....Jorge Perez-Rodriguez, 06 18718 (2008)**

When the Department fails to properly communicate the original closing order, but reopens a claim in response to an application to reopen and provides benefits, the Board obtains jurisdiction over an appeal of an order that re-closes the claim despite the Department's failure to communicate the original closing order. *Distinguishing In re Ronald Leibfried,* BIIA Dec., 88 2274 (1990). **....Glenda Singletary, 06 12195 (2007)** *[Editor's Note:* The Board's decision was appealed to superior court under Pierce County Cause No. 07-2-10345-2.]

When there has been an appeal of an order closing the claim and an application to reopen filed while the appeal is pending, the Department has 90 days from the final order of the Board or Court to issue an order on the application or the application will be deemed granted. The Department should not act upon an application to reopen the claim when the appeal from the claim closure is still pending in light of *Reid v. Department of Labor & Indus.*, 1 Wn.2d 430 (1939). *Distinguishing Marley v. Department of Labor & Indus*, 125 Wn.2d 533 (1995). **....Greg Ackerson, 94 1135 (1995)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Whatcom County Cause No. 95-2-00808-5. The Board has partially overruled this decision to the extent the decision relies on the concept of subject matter jurisdiction. *In re Betty Wilson* BIIA Dec., 02 21517 (2004), *In re Jorge Perez-Rodriquez* BIIA Dec., 06 18718 (2008)]

Where the last order closing the claim has been appealed and is not yet final the Department is not under any obligation to act upon a subsequent application to reopen the claim until a final order has been entered by either the Board or the Court, as the case may be. Under the circumstances of this case the time within which the Department had to act on the application to reopen the claim could not begin any sooner than the date upon which the Department received a conformed copy of the Superior Court's Stipulated Order of Dismissal. *Reid v. Department of Labor & Indus*., 1 Wn.2d 430 (1940). **....Edwin Fiedler, 90 1680 (1990)** [Consider impact, if any, of *Marley v. Department of Labor & Indus*., 125 Wn.2d 533 (1995) *See In re Greg Ackerson*, BIIA Dec., 941135 (1995)]

Where a prior closing order was not communicated to the claimant it was improper to construe a further order denying a subsequent application to reopen the claim as an order affirming the order closing the claim. The issues before the Department on an application to reopen the claim are different from those involved when closing the claim. In this case, the Board therefore directed the Department to treat the application to reopen the claim as a protest and to issue a further determinative order concerning the closure of the claim. **....Ronald Leibfried, 88 2274 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 91-2-00015-4. Although this decision correctly determines an application to reopen can be treated as a protest, consider the effect of In *re Jorge Perez-Rodriquez* BIIA Dec., 06 18718 (2008) on the effects of the denial of an application to reopen that becomes final when the original closing order was not communicated.]

Objective evidence requirement

Consistently positive Tinel's sign and positive Phalen's test constitute objective physical or clinical findings of worsening and are not merely subjective complaints or symptoms. **….Peggy Anderson, 09 11986 (2010)**

Some medical conditions cannot be measured by the independent observation of a physician, and where that is the case, the worker's subjective report of worsening coupled with a physician's opinion that supports the worker's report is sufficient to establish worsening. **....Charles Lewis, 07 16483 (2008)**

A worker's subjective description of increased pain is not sufficient to establish that the condition causally related to the industrial injury worsened or became aggravated between the relevant terminal dates since there must be some objective findings to support the complaints of increased pain and loss of function. **....John Anderson, 91 6315 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 93-2-00001-3.]

Under the 1988 amendments to RCW 51.32.160, the time limitation is removed for applying to reopen a claim to obtain additional medical services. However, in order to show entitlement to additional medical services, a worker must still establish, by a preponderance of the evidence, that the condition causally related to the industrial injury worsened or became aggravated on an objective basis between the relevant terminal dates. **....Marven Sandven, 89 3338 (1990)**

ER 703 does not eliminate the substantive rule requiring objective medical evidence of worsening. **....Earl Blake, 51,928 (1980)** [*But see Price v. Department of Labor & Indus.*, 101 Wn.2d 520 (1984)]

Over seven years after initial closure (RCW 51.32.160)

*The Director abused her discretion when she failed to consider whether the worker was unable to work because of the industrial injury and based her decision to deny benefits solely on the basis that the worker had not been working. **….Robert Dorr, Jr., 07 23982 (2009)**

Where a worker files an application to reopen more than seven years after the first closing order became final, such application is not timely within the meaning of RCW 51.32.160 but the worker is entitled to a determination of worsening and entitlement to proper and necessary treatment as authorized by RCW 51.36.010. **....Carol Allen, 91 1837 (1992)**

Permanent total disability

While it is not necessary to show an increase in category of impairment to establish an aggravation of condition resulting in permanent total disability, the worker must still show an increase in loss of bodily function demonstrated by objective medical findings. **....Jean Wassmann, 69,953 (1986)**

Proximate cause of worsened condition: new injury vs. aggravation

In considering the Department's requirement under WAC 296-14-420 to issue a joint order concerning whether a condition is the responsibility of a new claim or an aggravation of an existing claim, the Department can not be made to issue a joint order if a determination rejecting the new claim has become final. **….Douglas Lenz, 00 21329 (2002)**

Where a self-insured employer asserts that a worker's condition was the result of a new injury rather than an aggravation of the condition causally related to the industrial injury for which the employer was responsible, a Department order which included only the signature of the claims manager does not comply with WAC 296-14-420. To meet the requirements of WAC 296-14-420, the Department order must reflect that it is a single determination made jointly by the assistant directors for claims administration and self-insurance. **....Bennie Johnson, 91 4040 (1992)**

The occurrence of a new injury and an aggravation of a preexisting condition are not mutually exclusive. Whether a worker's worsened condition is a result of a new incident or constitutes an aggravation of the original injury depends upon whether the new incident is a supervening cause, independent of the original injury. The real question is one of proximate cause, *i.e.*, whether "but for" the original injury the worker would not have sustained the subsequent condition. **....Robert Tracy, 88 1695 (1990)**

Where a new traumatic event was wholly and independently responsible for the worker's worsened low back condition and the accepted industrial injury was not a proximate cause of the later occurring symptoms, the *McDougle* (64 Wn.2d 640) reasonableness test was inapplicable. **....William Dowd, 61,310 (1983)** [*Editor's Note*: Considered continued application in light of *In re Robert Tracy*, BIIA Dec., 88 1698 (1990).]

McDougle (64 Wn.2d 640) does not hold that a new accident identifiable in time and place, adversely affecting an area of the body previously injured in an industrial injury, should be considered an aggravation of that previous injury. The aggravation of the worker's condition is the result of the new and independent traumatic occurrence, not the industrial injury. **....Alfred Swindell, 53,792 (1980)** [*Editor's Note:* Considered continued application in light of *In re Robert Tracy*, BIIA Dec., 88 1698 (1990).]

Although the worker's initial low back condition was due to the industrial injury, the subsequent aggravation was due to a new, intervening and independent cause, and was not a proximate result of the industrial injury. The application to reopen the claim was therefore properly denied. **....Marian Roberts, 17,096 (1963)** [*Editor's Note:* Considered continued application in light of *In re Robert Tracy*, BIIA Dec., 88 1698 (1990).]

Proximate cause of worsened condition: new occupational disease vs. aggravation

Whether a carpal tunnel condition resulting from employment activities which give rise to a need for surgery is an aggravation of an occupational disease for which prior claims were filed, or a new occupational disease, is a question of proximate cause. A claim of aggravation of a prior condition and a claim for a new occupational disease may not be mutually exclusive. **....Leonard Roberson, 89 0106 (1990)**

Proximate cause of worsened condition: pre-existing condition

In order to be entitled to benefits on reopening of the claim it is necessary to show aggravation of the condition that was caused by the industrial injury; it is insufficient to show only a worsening of a pre-existing condition that was temporarily lit up by the industrial injury. **....Arlen Long, 94 2539 (1996) [***Editor's Note*: The Board's decision was appealed to superior court under Okanogan County Cause No. 96-2-00033-9.]

Psychiatric conditions

The rule in *Price* (101 Wn.2d 520), eliminating the need to show objective evidence of worsening, does not apply unless the worker's condition has a psychiatric rather than a physical basis and the diagnosis is in the terminology of the Diagnostic and Statistical Manual of Mental Disorders (DSM III) as required by WAC 296-20-330(e). **....Deborah Lee, 71,058 (1987)** [dissent] [*Affirmed, Lee v. Department of Labor & Indus*., 54 Wn. App. 1057 (1989)]

Res Judicata – See **RES JUDICATA** Aggravation

Scope of Review – See **SCOPE OF REVIEW** Aggravation

Survivor's benefits based on permanent total disability of deceased worker – See **SURVIVOR'S BENEFITS** Aggravation

Temporary worsening

When Department has reopened a claim for medical treatment it has admitted at least a temporary increase in disability (*In re John Qualls*, BIIA Dec., 28,430 (1969)). A worker need not prove aggravation in an appeal from an order reclosing the claim with no additional permanent disability award if the worker is seeking further treatment, time loss compensation or loss of earning power benefits. However, if the worker's condition is fixed and stable, it is incumbent upon the worker to establish a permanent worsening of condition by comparative evidence in order to prove entitlement to a permanent disability award. (*Dinnis v. Department of Labor & Indus*., 67 Wn.2d 654 (1965)). **....Maria Chavez, 87 0640 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 88-2-02121-9.]

In an appeal from a Department order denying an application to reopen the claim, the Board has jurisdiction to determine whether the worker's disability temporarily worsened during the aggravation period and can award temporary total disability compensation for such period. **....Junior Wheelock, 86 4128 (1987)** [*Editor's Note*: The Board's decision was appealed to superior court under Cause No. 88-2-00404-2.]

Although the evidence established that the worker's condition was fixed and that there was no increase in permanent disability as of the date the application to reopen the claim was denied, the worker was still entitled to benefits for a temporary worsening of his condition which occurred within the aggravation period. **....Leon Wheeler, 70,344 (1986)**

A prior finding that the worker's condition became aggravated requiring reopening of the claim for treatment establishes only a temporary increase in disability. In order to obtain an increased permanent disability award, the worker must still present proof of aggravation resulting in an increase in permanent disability. **....John Qualls, 28,430 (1969)** [dissent]

"APPEALABLE ONLY" ORDER

(See NOTICE OF APPEAL and PROTEST AND REQUEST FOR RECONSIDERATION)

APPEALABLE ORDERS

Attorney fees for services rendered only before Department

The Board does not have authority to determine the reasonableness of a fee for an attorney's services rendered before the Department except in conjunction with a request to fix a fee for services rendered in proceedings before the Board. Review of a Department order concerning the reasonableness of the attorney fee for services rendered only before the Department is obtained by application to superior court, not by appeal to the Board. RCW 51.52.120. **....Charles Langseth, 89 2249 (1989)**

Department agreed exam

In an employer's appeal taken from a closing order based on a medical examination through which the Department and the worker agreed to resolve the claim, the issue is limited to the appropriateness of the award for permanent partial disability. The decision to resolve the matter by stipulation could not be appealed because RCW 51.52.050 only authorizes appeals from final determinations. The final determination was the order resulting from the examination, not the decision to examine.
....Anthony Murphy, 94 1233 (1996)

Where a worker agreed to be bound by the results of a Department medical examination, the worker is not foreclosed from appealing the Department's determination since there is no statutory authority to bind parties to a final disposition of the claim. Only the Board has such authority pursuant to RCW 51.52.095, WAC 263-12-093. **....Rafael Rodriguez, 90 3308 (1991)**

Department order fixing interest pursuant to order of superior court

Where a worker prevailed in an appeal to superior court regarding a claim for temporary total disability, the responsibility for fixing interest lies with the court pursuant to RCW 51.52.135(3). The Board therefore does not have jurisdiction to review subsequent Department orders paying interest which were apparently entered pursuant to the order of the court. **....Charles Leo Courneya, 89 0845 (1989)**

Informal letters

Where a worker received a letter determination stating that the rate of time-loss compensation was correct and that a separate order would affirm earlier orders but the worker did not appeal the order subsequently issued, the Board concluded that the order was not res judicata regarding the rate of time-loss compensation for the periods set forth in the order since the letter determination had been appealed. **....Lucian Saltz, 92 4309 (1993)**

A letter from a Department auditor informing an employer that premiums are due and requesting payment is an appealable decision under either RCW 51.48.131 or RCW 51.52.050 and .060, even though the letter fails to contain the required statutory language regarding the employer's appeal rights. **....Maid-For-You, 88 4843 (1990)**

A letter advising the employer that the Department has accepted the worker's low back condition as causally related to the industrial injury does not constitute a formal statutory order and no res judicata effect attaches to the informal communication if it is not appealed. **....Kerry Kemery, 62,634 (1983)**

Interlocutory orders

A worker is aggrieved by an order paying time-loss compensation benefits, even if the Department has designated the decision as temporary, if the worker is disputing the rate of time-loss compensation. **….Robert Uerling, 99 17854 (1999)**

The Department cannot insulate a decision to terminate time loss compensation from Board review by characterizing the decision as "interlocutory." If the worker desires to appeal such a decision to the Board it is the worker's right to do so.
....Louise Favaloro, 90 5892 (1990)

Ministerial orders

A Department order issued pursuant to a superior court judgment is strictly ministerial and is not appealable to the Board. **....Alfred Greenwalt, Dec'd., 43,070 (1973)**

Oral decisions

A decision of the Department must be in writing before it can be appealed to the Board. **....Ryan Lowry, 91 C061 (1991)**

Orders held in abeyance (RCW 51.52.060)

Where the Department has held an order which has been appealed to the Board in abeyance pending further consideration, it must enter a further order within the time allowed by RCW 51.52.060. However, the failure of the Department to issue a further order within the time allowed does not make the order held in abeyance appealable. Such order is not a final order of the Department. **....Coni Oakes, 90 1968 (1990)**

Protest divests Board of authority to hear appeal – See also **NOTICE OF APPEAL** Protest treated as notice of appeal

When a worker appealed an order containing a statement of "protest rights", but later filed a protest and request for reconsideration of the same order within the time allowed for protest, the Board lost jurisdiction over the appeal. **....Mark Fossati, 95 1442 (1995)** [*Editor's note:* the Board encouraged parties to notify it when they have filed a protest after filing an appeal.]

Where a Department order included a statement of protest rights as required by RCW 51.52.050, but did not promise the issuance of a further appealable order after the filing of a protest, a protest to that order deprived the Board of jurisdiction. *Citing In re Santos Alonzo*, BIIA Dec., 56,833 (1981). **....Glen Fulps, 94 7894 (1995)**

A protest automatically operates to set aside and hold an order in abeyance pending the issuance of a further appealable order. Thus, even though an appeal from a Department order had already been filed by the worker, the employer's subsequent but timely protest of the order appealed leaves the Board without jurisdiction to hear the worker's appeal. **....John Robinson, 59,454 (1982)**

When a Department order promises that a further appealable order will be issued if a protest is filed, a timely protest automatically sets the order aside and holds it in abeyance. The Board therefore lacks jurisdiction to hear an appeal from the original order since it is not a final order. **....Santos Alonzo, 56,833 (1981)**

Provisional time loss compensation orders (RCW 51.32.210) – See also **APPEALABLE ORDERS** Interlocutory orders

Orders of the Department paying provisional time loss compensation, entered prior to the issuance of an order rejecting or allowing the claim on its merits, are not final orders of the Department under RCW 51.52.050 and .060. Until the Department issues a determinative order either rejecting or allowing the claim, the payment of provisional time loss compensation cannot be challenged by an appeal to the Board. **....Ruth Logan, 89 0189 (1989)**

Self-insured employer's order (RCW 51.32.055)

A closing order issued by self-insured employer under the authority of RCW 51.32.055(7)(a) may conditionally close the claim. The closure is subject to reevaluation by the Department within two years on the basis that the claim was improperly or prematurely closed. **....Noel Bray, Jr., 89 2484 (1991)** [dissent] [*Editor's Note*: The provisions cited apply only to claims accepted by self-insurers after June 30, 1986 and before July 1, 1990--the window period expressed in RCW 51.32.055(7)(d) does not apply to claims accepted after June 30, 1990 and closed with medical treatment only.]

An order issued by a self-insured employer under the authority of RCW 51.32.055(7)(c) is not appealable to the Board, notwithstanding the fact the order may state otherwise. However, the further determinative order of the Department which must be issued following the filing of a protest with the Department is appealable to the Board. **....Laverne Alvarado, 87 4566 (1988)**

Temporary orders

The worker is allowed to litigate entitlement to time-loss compensation after the Department changes an order closing the claim and terminating time loss from final to "temporary." The Department cannot isolate a decision to terminate time-loss compensation from Board review by characterizing it as a temporary decision. **....Tony Perry, 03 19142 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 05-2-0140-3.]

APPLICATION FOR BENEFITS

Application to reopen treated as accident report

An application to reopen a claim for a prior injury, filed within one year of a new injury, may properly be considered as a claim for that new injury where information concerning the new incident has been supplied to the Department. **....Stanley Lee, 09,425 (1959)** [*See also In re John Svicarovich*, BIIA Dec., 08,205 (1957), **APPLICATION TO REOPEN CLAIM**]

Reasonable notification

A worker's letter to the Department explaining that he had injured his back the day before he suffered from an accepted injury described as "heat" coupled with a letter from a physician's assistant indicating that the worker was seen for heat exhaustion and back pain constitute an application for benefits within the meaning of RCW 51.28.020. **....Leroy Norris, 92 1471 (1993)**

When an application for benefits identified two dates within a week of each other that injuries had occurred, the reference to the earlier injury in medical notes attached to the application for benefits in the second injury constituted a filing of a request for benefits because it reasonably put the Department on notice of the earlier alleged industrial injury. **....Charles Pierce, 91 4625 (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 91-2-07862-4.]

APPLICATION TO REOPEN CLAIM

Accident report treated as application to reopen

An accident report may constitute an application to reopen for aggravation of condition where the Department has not been misled or prejudiced. The worker should not be penalized for using the wrong form in applying for additional benefits. **....John Svicarovich, 08,205 (1957)** [*See also In re Stanley Lee*, BIIA Dec., 09,425 (1959) **APPLICATION FOR BENEFITS**]

Office notes treated as application to reopen

An application to reopen must be in writing, be individual in nature, and give the Department information regarding the reason for the application *Donati v. Department of Labor & Indus*., 35 Wn.2d 151 (1949)), but the Department may not require a worker to submit an application to reopen by using a particular form (WAC 296-14-400). Where worker's physician submitted office notes recommending further treatment, the Department should have treated the same as an application to reopen. **....Wallace Hansen, 90 1429 (1991)** [*Cf. Tollycraft Yachts v. McCoy*, 122 Wn.2d 426, 433 (1993)]

APPORTIONMENT BETWEEN INSURERS

(See OCCUPATIONAL DISEASE)

ASSESSMENTS

(See also DEPARTMENT, PENALTIES and RETROSPECTIVE RATINGS)

Bankruptcy

The filing of a bankruptcy petition prevents collection action on a debt; it does not stay actions relating to determination of the amount of taxes due and does not prevent the Board from taking further action on an appeal of an assessment. **....Pro-Wall, Inc., 05 21844 (2008)**

Classification of business

Although an assessment on appeal does not involve a reclassification, the Board will consider any of the factors the Department addressed in calculating assessment, including whether the appropriate classification was used during the audit period. **....Henry Bacon Building Materials, Inc., 90 0656 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 92-2-02279-3.]

Communication of order (RCW 51.48.120)

Where service of a notice and order of assessment is perfected by mailing a notice by certified mail to the employer's last known address, and where an attorney or other representative has appeared before the Department on behalf of a firm and expressed desire to receive further communication from the Department regarding the assessment, the Department is obligated to direct all future correspondence to the firm's attorney or representative. **....Bell & Bell Builders (II), 90 5119 (1992)**

Decisions appealable – See **APPEALABLE ORDERS** Informal letters

Delegation of authority to issue Notices and Orders of Assessment

Authority to issue Notices and Orders of Assessment is properly delegated to collection auditors even in the absence of written documentation of the Director's delegation. Efficient use of agency Director's time outweighs value of creating specific written documentation memorializing the delegation of authority.
....Wayne Jamison et ux Wayne Jamison Timberfallers, 87 1383 (1988)

Effect of failure to allow inspection of records (RCW 51.48.040)

Where an employer failed to provide records to Department on Fifth Amendment grounds, it is precluded from presenting evidence at the Board that the assessment was incorrect. *Citing Annest v. Annest* 49 Wn.2d 62 (1956). **....Cheri's Pet Grooming, 89 5939 (1991)**

Estimated premiums

In an assessment appeal, the Board found that the employer failed to establish equitable estoppel where a Department audit included a determination that employer's premiums would be assessed on the basis that the employer paid employees on a commission basis, the employer failed to show justifiable reliance. **....AEX Corporation, 90 5314 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 93-2-00171-6.]

Any assessment of premiums based upon an estimate of hours worked, as permitted by RCW 51.16.155, must be based upon a reasonable estimate which has some basis in fact. **....NAO Enterprises, 89 1832 (1990)**

Existence of partnership

Where individuals became partners upon completion of training period, industrial insurance taxes were payable for an individual who never completed the payments necessary to establish partnership. **....F & R Cliff dba Cliff's Dairy Cow Hoof Trimming, 93 2648 (1994)**

Failure to maintain records

Where a firm failed to maintain adequate records but could present only an educated guess regarding the number of hours worked by cab drivers and paid the drivers at the rate of 45 percent of fare-generated fees, the firm failed to establish that it paid the drivers on any basis other than commission. **....AEX Corporation, 90 5314 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 93-2-00171-6.]

The provisions of RCW 51.48.030 and .040, which require an employer to keep and preserve adequate books and records of employment and make them available for inspection by the Department, do not require a corporation which engaged in no business activity and had no employees to maintain such records. **....NAO Enterprises, 89 1832 (1990)**

Limited liability company

Members of a limited liability company that manage the company are exempt from mandatory coverage. **….J D I, LLC, 09 18829 (2010)**

Piece Work

In an assessment appeal, the Board found equitable estoppel where the employer relied to its detriment on Department representations and past practices on determinations of average rate of compensation for piece workers and where the employer would suffer if the Department were allowed to repudiate or contradict its prior acts, practices, and policies. **....State Roofing & Insulation, Inc., 89 1770 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 91-2-01375-4.]

Penalties

In assessing a penalty under RCW 51.48.030 for failure to keep records of an employee, the Department may assess a separate penalty for each employee for which records were not kept. **….R & G Probst, et ux, dba Diamond Driving, 00 11968 (2001)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 01-2-02279-0.] [Affirmed, *Probst v. Department of Labor & Industries*, 121 Wn. App 288 (2004)]

Prime contractor liability (RCW 51.12.070)

Because RCW 51.12.070 makes the letting contractor primarily and directly responsible for all premiums due for work performed by sub contractors, the Department need not exhaust collection remedies against subcontractors or their bonds before collecting from the letting contractor and may apply payments received first to interest, then fees, then penalties, and then to premiums. **....GL & L Enterprises, Inc. d/b/a Precision Drywall, Inc., 05 13857 (2008)**

A firm involved in tree planting and tree thinning contracted directly with landowners and subcontracted with a second firm. The second firm had many claims filed but had not paid industrial insurance taxes. In light of the contractual arrangement, and the fact that the second firm performed the actual work, the Board concluded that the firm was responsible as a prime contractor. *Citing Littlejohn Construction v. Department of Labor & Indus.*, 74 Wn. App. 420 (1994). **....Sylvia Reforestation, Inc., 93 5150 (1994)**

Reassumption of jurisdiction (RCW 51.48.131)

Department's failure to act to modify, reverse or change its assessment decision within thirty days of receipt of the employer's appeal renders all subsequent orders null and void and vests jurisdiction with the Board even though the Department failed to forward the appeal to the Board. **....Maid-For-You, 88 4843 (1990)**

Subcontractors

A landowner does not "let a contract" within the meaning of RCW 51.12.070 when selling downed timber for harvesting pursuant to a sales contract. The purchaser of the timber is not considered a subcontractor of the landowner/seller.
….Weyerhaeuser Co., 99 12028 (2000)

Successor liability — Limitation of action (RCW 51.16.190)

The three-year statute of limitation, as set forth in RCW 51.16.190(3), on actions to collect a delinquent assessment does not apply when the successor firm fails to file a report of sale as contemplated by RCW 51.16.200. **….B L C Trucking, Inc., 98 11140 (2000)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 00-2-00689-3.]

ATTENDANT SERVICES

Attendant care, as authorized by RCW 51.32.060(14) [RCW 51.32.060(3)], is not limited to "constant" care nor is it restricted to a worker so "physically helpless as to be unable to care for his personal needs" as stated in WAC 296-20-091. A blind worker need not rely on the charity of others to provide the basic necessities of life, nor can payment for those services be denied merely because they are provided by the worker's spouse. **....Delbert Johnson, 89 0398 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Whatcom County Cause No. 90-2-00872-6.]

A worker is not precluded from receiving attendant care services under RCW 51.32.060(5) [now RCW 51.32.060(3)] even though the worker is receiving discretionary medical care under RCW 51.36.010, so long as the services are not duplicative. **....Ovide DuBois, 34,754 (1970)** [*See also* RCW 51.32.072]

Whether the worker "requires" the services of an attendant is determined by an evaluation of the worker's physical condition and not by the financial ability to pay for such services or by the willingness of family members to provide the needed care. **....Agnes Knoell, 24,242 (1967)** [dissent]

A psychiatric condition, the manifestations of which are physically incapacitating, may satisfy the statutory requirement of "physical helplessness", entitling the worker to attendant care services. **....Agnes Knoell, 24,242 (1967)** [dissent]

ATTENDING PHYSICIAN

Selection (RCW 51.36.010)

A worker's choice of physician is appropriately limited to one "conveniently located" within a proximate geographical area. **....Loren Denison, 91 5619 (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Stevens County Cause No. 93-2-0066-7.]

Transfer (WAC 296-20-065)

WAC 296-20-065 requires that the Department or self-insured employer approve of a transfer of attending physician. The worker will not be allowed to transfer until the attending physician has had sufficient time to complete a treatment regimen, complete diagnostic studies, and evaluate the efficacy of the therapeutic program. The mere fact that the worker is unhappy with the physician does not warrant a transfer**.**
....Maria Gonzalez, 97 0261 (1998)

ATTORNEY FEES FIXED BY BOARD (RCW 51.52.120)

Attorney fees not allowed on interest award

It is unlawful to charge an attorney fee from interest awarded pursuant to RCW 51.52.135. **....Floyd Allen, 69,533 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Skagit County Cause No.88-2-00124-6]

Factors to be considered

The size of the pension reserve is only one of the factors to be considered in arriving at the amount of the fee. Other factors which may be taken into consideration are: the time involved in litigation and the controverted nature of the case; the amount of the retroactive pension; the financial status of the worker; and the humanitarian social objectives of the Industrial Insurance Act. **....Edith Colbo, 16,117 (1968)**

Fees for services rendered only before Department – See **APPEALABLE ORDERS** Attorney fees for services rendered before the Department

AUDIOLOGISTS

(See CAUSAL RELATIONSHIP)

BENEFICIARIES

(See also COMPUTATION OF BENEFITS)

Abandonment of spouse (RCW 51.08.020)

A worker was fatally injured in a logging accident. Although separated from the surviving spouse for three years, the worker provided occasional money for contributing to life necessities, had continued to visit on a regular basis, and had hoped to regain the marriage. Under these circumstances, the spouse was not living in a state of abandonment and had been provided with funds for maintenance as required by RCW 51.08.020. **….Loren Snavely, 95 7778 (1997)**

Child (RCW 51.08.030)

The statute defining "child" is not intended to include children to whom the worker stands in loco parentis. **....Cletus Tyrrell, Dec'd., 12,121 (1960)**

Dependent (RCW 51.08.050)

Low-income family members who receive cash from a worker to be used for their medical expenses can be considered dependents of the workers for purposes of RCW 51.32.050(5). **….Oscar Vasquez, 99 19523 (2001)** [dissent]

The worker's payments to his mother for his own room and board did not constitute "support" and she was therefore not dependent on the deceased worker at the time of his death. **....Owen Raines, Dec'd., 08,542 (1957)**

Permanent partial disability benefits

A beneficiary may be entitled to benefits under RCW 51.32.050 and RCW 51.32.067 if it is established that the disability would have been permanent even if the worker had not died from unrelated causes before treatment was complete **....James McShane, Dec'd., 05 16629 (2006)**

Permanent total disability benefits

A beneficiary may be entitled to benefits under RCW 51.32.050 and RCW 51.32.067 if it is established that the disability would have been permanent even if the worker had not died from unrelated causes before treatment was complete. **....James McShane, Dec'd., 05 16629 (2006)**

Spousal benefits are derived from the worker's pension reserve and are not calculated separately. When a worker is found totally and permanently disabled and dies prior to making an election pursuant to RCW 51.32.067, a previously paid permanent partial disability award must be taken out of the pension reserve and the Department has authority to select the spousal option. **....Gary Christian, Dec'd., 96 4751 (1998)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 98-2-00106-9]

RCW 51.32.010 permits payment of permanent total disability pension benefits to a custodial parent where a minor was in legal custody of a divorced spouse because RCW 51.32.090(2), regarding payment of compensation for temporary total disability to the person actually providing support for a child, does not apply to payments for permanent total disability benefits. **....Dorsey Hursh, 90 6802 (1991)**

A spouse, substituted as the appealing party where the worker died during the pendency of the appeal, who established that the worker was permanently totally disabled as of the date his time loss compensation benefits were terminated, two years before his suicide, was entitled to benefits under RCW 51.52.050(6). **....William Zygarliski, Dec'd., 89 1094 (1990)**

RCW 51.32.020 only applies when compensability hinges on the cause of the death. That statute does not bar a claim for benefits by a surviving spouse where the worker's death by suicide takes place while the worker is in a status of permanent total disability. **....John Hoerner, Dec'd., 67,267 (1985)** [Rule upheld by *Department of Labor & Indus. v. Baker*, 57 Wn. App. 57 (1990)

While the death of a worker who commits suicide with intent and deliberation is not compensable under RCW 51.32.020, the surviving spouse is not foreclosed from benefits under RCW 51.32.050(6) if the worker was permanently totally disabled at the time of death. **....Owen Larkin, Dec'd., 18,441 (1965)** [dissent] [Rule upheld by *Department of Labor & Indus. v. Baker*, 57 Wn. App. 57 (1990)

Spouse (RCW 51.32.040)

In the circumstance where a worker died while the appeal was pending and the survivor proves the spousal relationship, and establishes that an application for survivors' benefits has been filed with the Department, the spouse will be substituted as the appealing party and is entitled to pursue any benefits to which the deceased worker may have been entitled. **....William Zygarliski, Dec'd., 89 1094 (1990)**

BENEFITS PENDING APPEAL

Where there was no question that the worker was entitled to treatment for a condition causally related to an injury under the jurisdiction of the Department, and the only dispute was over which injury and which employer was responsible for the condition, the worker's receipt of benefits should not have been delayed by an employer's appeal. The Department was ordered to provide treatment and compensation during the pendency of the appeal. **....Mario Miranda, 40,116 (1972)**

BOARD

(See also PETITIONS FOR REVIEW, SANCTIONS, SCOPE OF REVIEW and STANDARD OF REVIEW)

Additional evidence secured on Board's own motion (RCW 51.52.102; WAC 263-12-120)

The parties' agreement to submit the appeal on the Department file does not prevent the Board from securing additional live testimony on its own motion.
....W. Tom Edwards, 26,382 (1967)

Appearance of fairness doctrine

A Board member may participate in the decision on an appeal from a Department order entered when he was the Supervisor of Industrial Insurance where the appeal raised only a legal issue and, despite the fact that his name appeared on the Department order, he was not personally involved in the Department action on the claim.
....Sandra Lucille Walster (II) 43,049 (11/73) [special concurrence]

Binding examinations

The procedure for binding examinations is designed to assure the objectivity of the examiner by restricting contact between advocates and the examiner, by reducing the possibility of an ambiguous result by providing the physician with the necessary historical background through records mutually selected by the parties and by directing the examiner to respond to specific questions concerning the worker's condition. **....Miles Ulrich, 93 1363 (1994)**

Constitutional questions

The Board has no jurisdiction over constitutional issues. To the extent *In re Danny Thomas,* BIIA Dec., 40,665 (1973) concludes the Board may have such authority in certain circumstances, it is overruled. **....James Gersema, 01 20636 (2003)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 03-2-05093-3.]

The Board, anticipating what the Supreme Court would do if presented with the issue, reached the inevitable conclusion that the statute excluding illegitimate children from receiving benefits (RCW 51.32.005) was violative of the Equal Protection Clause of the U.S. Constitution. **....Danny Thomas, 40,665 (1973)** (Overruled *In re James W. Gersema,* BIIA Dec., 01 20636 (2003))

County in which hearings held

If a party timely objects to the scheduling of a continued hearing in a county other than the county where the injury occurred or the worker resides, it is incumbent upon the Industrial Appeals Judge to make a determination as to whether "a continuance elsewhere is required in justice to interested parties." RCW 51.52.102 and WAC 263-12-115(7).
....Maria Chavez, 87 0640 (1988) [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 88-2-02121-9.]

Discovery

Before applying sanctions for failure to answer requests for admission, consideration should be given to: 1) whether permitting an extension of time to respond promotes the presentation of the merits of the claim, and 2) whether the extension will prejudice the other party. *Citing Santos v. Dean*, 96 Wn. App. 849 (1999). Extension is not required when the admissions establish only a prima facie case and do not support a summary judgment. **….Duane Harper, 99 11127 (2000)**

Equitable powers

In order to be entitled to equitable relief for failing to file a timely protest, a worker must satisfy a two-part test to excuse the untimely filing. The worker must first establish that the worker is illiterate in English and unable to ascertain and/or understand the nature and contents of the order; and second, the worker must establish some misconduct in communication of the order on the part of the Department if it knew or should have known that the worker was illiterate in English. **....Adela Gonzalez, 05 23236 (2006)**

The principles of equitable estoppel are applied only under the principle of stare decisis. Where there has been no determination by a court of final jurisdiction applying equitable estoppel to excuse an untimely filing under RCW 51.28.050, the Board will not apply the doctrine to a situation where the worker alleges that the Department employees improperly informed him of the requirements for filing an application for benefits. Additionally, the record failed to establish that the inaccurate statements caused injury to the worker, that the failure to timely apply for benefits was due to the worker's own mistake. *Citing In re State Roofing & Insulation, Inc.*, BIIA Dec., 89 1770 (1991). **....James Neff, 92 2782 (1994) [***Editor's Note*: The Board's decision was appealed to superior court under Whatcom County Cause No. 94-2-01446-0.]

To establish equitable estoppel, an employer, in an assessment appeal, must prove each element. Where a Department audit included a determination that employer's premiums would be assessed on the basis that the employer paid employees on a commission basis, the employer failed to show justifiable reliance. **....AEX Corporation, 90 5314 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 93-2-00171-6.]

Because the courts have applied equitable estoppel against the state, if there is no question or doubt as to the extent of the Board's jurisdiction in a particular case, the Board may apply the doctrine under the principle of stare decisis in the same manner as it applies other principles of law. Estoppel will apply in proper circumstances against the Department, in its role as a taxing agency, and reliance, if reasonable, may be placed upon both the silence and non action of the state where it ought to speak, as well as upon affirmative statements and actions. **....State Roofing & Insulation, Inc., 89 1770 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 91-2-01375-4.]

The Board has no inherent equitable powers. **....Ben Ramahlo, 85 C025 (1987)**

In applying the principles of *Rodriguez* (85 Wn.2d 949) and *Ames* (176 Wash. 509) the Board is not exercising equitable powers but is anticipating the relief which would be granted, under the doctrine of stare decisis, upon further appeal to superior court. It is without authority to expand those doctrines to cover cases with dissimilar facts. **....Ronald Jamieson, 62,551 (1983)**

The Board's powers are limited to those expressly granted by the legislation which created it. Since the Board has no equitable powers under Ch 51 RCW, it may only, under the doctrine of stare decisis, apply equitable principles determined by the appellate courts in similar cases. **....Seth Jackson, 61,088 (1982)**

Examination by industrial insurance appeals judge

When the party with the burden of proof is unrepresented, judges must ask questions with the purpose of eliciting the facts needed to support a prima facie case, and should not advocate for any party, ask leading questions, or ask questions that attempt to elicit inadmissible testimony. **….Evangelina Acevedo, 08 15613 (2009)**

When securing evidence necessary to fairly and equitably decide an appeal, an industrial appeals judge shall ask those questions necessary to present a prima facie case. **....Calvin Williams, 04 12770 (2005)**

Hearing

A hearing on a motion to dismiss satisfies the requirement for a hearing under *Watt v. Weyerhaeuser Co.*, 18 Wn. App. 731 (1977) when the hearing is held pursuant to proper notice and the parties understand the hearing may result in a final disposition of the appeal. **....José Benavides, 05 10661 (2007)**

Joinder – See decisions listed under **JOINDER**

Jurisdiction determination based on Department file – See **SCOPE OF REVIEW**

The Board may review and take notice of the contents of the Department file, sua sponte, at any stage of the proceedings, in order to determine whether it has jurisdiction over the appeal. **....Mildred Holzerland, 15,729 (1965)**

Jurisdiction in assessment appeal – See **SCOPE OF REVIEW**

Jurisdiction in WISHA appeal (RCW 49.17)

The Board is authorized to hear appeals from any action taken by the Department except where a specific provision deprives it of jurisdiction and RCW 49.17 does not deprive the Board of jurisdiction in appeals from an order of immediate restraint.
....Air Quality Services, Inc., 92 W370-C (1993) [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 93-2-00358-4.]

The Board does not have jurisdiction to consider an appeal from a Department decision not to conduct an inspection of the work site or issue a citation for alleged violations of Industrial Safety and Health Act. **....Jay Holloway, 91 3679 (1991)**

Moot Appeals

Where a worker appealed an order closing the claim with permanent partial disability award and also appealed a vocational services determination and dismissed the appeal of the closure order, the appeal challenging the vocational determination became moot since a claim cannot be reopened solely for vocational rehabilitation purposes. RCW 51.32.095(7) **....Tina Gonzalez, 89 5233 (1991)**

Motion to vacate order adopting proposed decision and order

Miscommunication between an attorney and client does not establish a lack of consent for purposes of vacation of a Board order. **....Iva Jennings, 01 11763 (2002)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause N o03-2-15607-8-KNT & 04-2-04473-1-SEA.]

Failure to ensure that the Board has extended the time in which to file a petition for review is not excusable neglect that would warrant vacation of an Order Adopting Proposed Decision and Order. **....Randy Squance, 00 17407 (2002)**

Motion to vacate order denying petition for review

Where the Board used the date of manifestation for calculating benefits in occupational disease claim, but the worker's beneficiary determined benefits payable would be greater if the date of last injurious exposure were used, the failure to determine the financial consequences of different benefit rates before issuance of proposed decision and order does not constitute a mistake or excusable neglect which would justify vacating order under CR 60. **....Robert Sarbacher, Dec'd., 88 3107 (1991)**

Motion to vacate order dismissing appeal

Inaccurate advice from an attorney regarding the effect of dismissing an appeal is not a basis on which to vacate the dismissal. **....Peggy Hardy, 96 6361 (1998)**

Motion to vacate order on agreement of party

A party who chooses not to participate in proceedings may not have an agreement vacated simply because their consent was not obtained. **....Kenneth Merrill, 06 22417 (2008)**

An agreement may be vacated when a party demonstrated a desire to participate in the appeal and has a legitimate excuse for the failure to participate in the agreement. **....Deborah Jimenez, 01 19072 (2002)**

Mutual mistake for purposes of vacating an Order on Agreement of Parties can be established where it is demonstrated the resolution was not based on a meeting of the minds. **....Hector Alaniz, 00 19916 (2001)**

New evidence

The record will not be opened to allow the worker to present additional evidence where there is no showing that the evidence could not have been discovered with reasonable diligence prior to the conclusion of the hearings. **....Eileen Cleary, 92 1119 (1993)**

Nunc pro tunc order

The Board is without authority to issue an order nunc pro tunc directing the Department to pay a widow's estate her accrued pension benefits where the widow dies after the Board has granted the Department's petition for review from a proposed decision and order granting the widow's pension, but before the Board has issued its decision and order. (RCW 51.32.040) **....Johanna Hoerner, Dec'd., 70,575 (1986)** [*Editor's Note: Clingan v. Department of Labor & Indus*., 71 Wn. App. 590 (1993) addresses court authority to issue nunc pro tunc order. The Board's decision was appealed to superior court under Benton County Cause No. 86-2-00646-7.]

Offer of judgment CR 68

CR 68, which provides for payment of costs if an offer of judgment is declined and the matter ultimately is resolved for the offered amount or less, does not apply to proceedings before the Board. **….Elena Osborn, Declaratory Ruling (1999)**

Order on agreement of parties – See also **SAFETY AND HEALTH** Order on Agreement of Parties

An order on agreement of parties can only be vacated by a subsequent or additional order of the Board. An industrial appeals judge is without authority, on a party's motion, to vacate an order on agreement of parties and issue a proposed decision and order reaching the same result. In that circumstance, the proposed decision and order is a nullity. **....Theresa Baker-Nolden, 90 4968 (1992)** [special concurring opinion] [*Editor's Note:* CR 60(a) applies in instances of clerical error. *See Marriage of Stein*, 68 Wn. App. 922 (1992); *Marriage of King*, 66 Wn. App. 134 (1992) Otherwise, CR 60(b) applies. *Northwest Investment v. New West Fed.,* 64 Wn. App. 938 (1992)]

An industrial appeals judge does not render a final judgment or final decision and order; only the Board has such authority under RCW 51.52.050. Where an industrial appeals judge declined to accept the parties' stipulation after the hearing date on the basis that issuance of a proposed decision and order, dismissing the matter for failure to present evidence when due, was merely a ministerial act, the proposed decision and order should be vacated and an order, based upon the agreement of parties, entered. **....John Herrin, 89 5253 (1991)**

When a petition for review is filed, the scope of the Board's review extends to all contested issues of law and fact and is not limited to the specific issues raised by the petition for review. **....Richard Sims, 85 1748 (1986)**

An order denying an appeal cannot be petitioned to the Board but must be appealed to superior court. [RCW 51.52.080] **....Sandra Lucille Walster (II), 43,049, (11/73)**

Reassignment of Industrial Appeals Judge

When a case is reassigned from one judge to another, the expectation is that the new judge will exercise independent judgment and take whatever further steps he or she deems appropriate. **….Nathan Rosentrater, 08 20200 (2009)**

Remand for additional evidence

Where parties had agreed to be bound by the results of a Board-sponsored medical examination, the industrial appeals judge did not follow the ordinary procedures for obtaining the examination, the worker asked for the opportunity to cross-examine the physician, and the industrial appeals judge issued a proposed decision and order without ruling on the motion, the Board vacated the proposed decision and order and remanded for further proceedings. **....Miles Ulrich, 93 1363 (1994)**

Where the Department received a call indicating a worker was employed during the period the worker received loss of earning power benefits, the call raised the question of mistake as to the amount of benefits properly payable but did not establish fraud and motion for summary judgment should have been denied. As a result, the Board remanded to hearing process to determine whether an overpayment existed and if so, whether the benefits were fraudulently obtained. **....Sherryl Schank, 90 1542 (1991)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 92-2-04865-3.]

Where the employer has received notices of proceedings but failed to appear, it has waived its right to present evidence and the Board will not remand the appeal for further hearings to permit the employer to do so. **....Joseph Benoit, 35,483 (1971)**

Remands from Superior Court

RCW 51.52.115 indicates that the Superior Court, in case of modification or reversal of the Board's order, should refer its order to the Department, not the Board, and to direct the Department to act in accordance with the court's findings. In the circumstances of this case, the Superior Court order directed the Board to issue an order directing the Department to issue an order reopening the claim for aggravation of the condition causally related to the industrial injury, paying time loss compensation benefits, with a permanent partial disability, reduced by an overpayment, denying responsibility for a condition identified as thoracic outlet syndrome, and thereupon closing the claim. **....Daniel Hatch, 63,150 (1992)**

Response to petition for review

The ten day time period set forth in WAC 263-12-145(3) for filing a response to a petition for review is not jurisdictional. The Board may therefore consider a response filed after the ten day period has elapsed. **....Daniel Furlong, 65,138 (1985)**

Sanctions – See **SANCTIONS**

Scope of review - See **SCOPE OF REVIEW** Closing Order

Stay of proceedings

The Board need not suspend proceedings in the worker's appeal where the employer served the Board a bankruptcy court's stay in an industrial insurance appeal where the employer is not self-insured but participates in the state fund since the presence or absence of the employer from the proceeding has no impact on the adequacy of the statutory relief available. *Citing Matter of Johns-Manville Corp.*, 99 Wn.2d 193 (1983). **....Mary Propst 92 2186 (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 93-2-06468-1.]

Subpoena

Where a physician has developed an opinion as an expert and has expressed that opinion, a subpoena should not be refused solely on the ground that the physician has refused to speak with the litigant or the litigant is unable to pay other than the statutory witness fee. **…Ronald Baker, 99 21232 (2001)**

Substitution of parties

In the circumstance where a worker died while the appeal was pending and the survivor proves the spousal relationship, and establishes that an application for survivors' benefits has been filed with the Department, the spouse will be substituted as the appealing party and is entitled to pursue any benefits to which the deceased worker may have been entitled. **....William Zygarliski, Dec'd., 89 1094 (1990)**

Summary judgment

A declaration in support of summary judgment is insufficient if opinions are not related to the critical date or contain only conclusory opinions, without the requisite supporting facts showing the basis for those opinions. When a declaration is deficient, the opposing party is not required to file a responsive declaration from a medical expert. **….Nathan Rosentrater, 08 20200 (2009)**

To raise an issue of credibility on a motion for summary judgment, the non-moving party must present contradictory evidence or otherwise impeach the evidence of the moving party. The non-moving party may not rely on speculation or argumentative assertions to establish an issue of material fact. **….David Gruger, 08 14143 (2009)**

The Board has the authority to resolve appeals, in whole or in part, by summary judgment. RCW 51.52.140; WAC 263-12-125; CR 56. **....David Potts, 88 3822 (1989)**

Summary judgment - time limits

Summary judgment is not appropriate when the motion was filed later than permitted under CR 56 and the worker failed to establish that there were no issues of material fact. CR 56 does not provide for discretion with respect to filing timelines, the only discretion permitted is with respect to the requirement that the motion be heard more than 14 days before the hearing. **….Duane Harper, 99 11127 (2000)**

Telephone hearings

An industrial appeals judge has discretion to determine in what circumstances telephone testimony will be allowed over the objection of a party. Factors impacting that decision include objections related to oath giving and verification of the witness's identity, and assessing credibility. Oath giving and identification are germane only to objections based on concerns that the witness may not be who they purport to be. Objections related to assessing credibility should be tempered by the realities of the appeal process where the Board members or the court or jury are the ultimate assessors of credibility, not the industrial appeals judge. **….Peter Kim, 00 21147 (2002)**

Transcript corrections

If a party believes there is an error in the transcript, the party should file a motion with the industrial appeals judge, who will then hold a proceeding and place the burden on the moving party to explain why the transcript is in error and should be changed. **....Cascade Utilities, Inc., 04 W1392 (2006)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 06-2-38556-0 SEA.]

Two member Board

The Department order must stand when the Board is reduced to two voting members who disagree on the disposition of the appeal. **....Herbert Thomas, 42,061 (1973)**

BURDEN OF PROOF

(See also MOTION TO DISMISS)

Abandonment

When the Department rejects a claim for survivor's benefits on the grounds of abandonment, the Department has the burden of proving abandonment. **….Loren Snavely, 95 7778 (1997)** *Citing Johnson v. Department of Labor & Indus.*, 3 Wn.2d 257 (1940)

Employer appeal

In an employer appeal, the employer must first present evidence sufficient to make a prima facie case. The burden then shifts to the worker to establish her entitlement to benefits by a preponderance of the evidence. **....Christine Guttromson, 55,804 (1981)** [*Editor's Note:* The language in the order erroneously refers to the burden shifting to the claimant when the claimant chose to present evidence.]

Fraud – See **FRAUD** Burden of Proof

Hearing loss

When the evidence shows that a worker continued to be placed in a noisy work environment after the date of a given audiogram, the burden shifts to the employer to show by persuasive evidence that the subsequent workplace noise was not injurious to the workers hearing. **....Eugene Williams, 95 3780 (1998)** [dissent]. [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 98-2-00806-4, Department; Lewis County Cause No. 982-00422-1, Employer]

Injury – See **INJURY** Burden of Proof

WISHA appeals – See **SAFETY & HEALTH** Burden of Proof

WISHA – failure to abate – See **SAFETY & HEALTH** Burden of Proof-failure to abate

Vocational Rehabilitation – See **VOCATIONAL REHABILITATION** Burden of Proof

CAUSAL RELATIONSHIP

(See also AGGRAVATION, PERMANENT TOTAL DISABILITY and SUBSEQUENT CONDITION TRACEABLE TO ORIGINAL INJURY)

Audiologist

Hearing loss must be established by medical evidence. The testimony of an audiologist is therefore insufficient to make a prima facie case for causal relationship and extent of permanent partial disability. **....Virgil Degolier, 60,471 (1983)**

Chiropractor

Following the amendment of RCW 18.25.006, chiropractors are allowed to treat upper and lower extremities and can testify about causation of upper and lower extremity conditions as matters within the scope of chiropractic practice. **….Tami Lynn, 09 16657 (2010)**

Because the low back is a part of the anatomy falling within the special field of chiropractic, a chiropractor may testify to the causal relationship between the worker's low back condition and the injury. **....Ernest Pfenniger, 41,425 (1973)** [dissent]

Chiropractic testimony is sufficient to establish a prima facie case for a causal relationship between an industrial injury and the worker's low back condition, since the treatment of low back conditions is within the "special field" of chiropractic. **....H. U. Shipley, 08,043 (1957)**

Physical therapist

A physical therapist is not qualified to render opinions of medical causation. **....Juan Muñoz, 05 11698 (2007) [***Editor's Note: The Board's decision was appealed to superior court under King County Cause No.07-2-38541-0KNT*].

Physician's Assistant

Because the Department's medical aid rules permit a physician's assistant to render opinions on causation, a physician's assistant's opinion is a sufficient expert opinion to prove causation of a diagnosed condition. **….Evelyn Woods, 07 23506 (2009)**

Psychologist

Psychologist diagnoses of certain mental health conditions not listed in DSM-IV were within the psychologists' scope of practice and were valid diagnoses of the worker's conditions caused by the exposure at work. ….Diana Gegg, 08 16647 (2010)

A licensed clinical psychologist is competent to testify on the issue of the cause of mental conditions. **....Robert Hedblum, 88 2237 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 89-2-02751-5.]

CHIROPRACTORS

(See CAUSAL RELATIONSHIP)

COLLATERAL ESTOPPEL

(See also RES JUDICATA)

Department order in another claim

Where the worker filed both an application to reopen a prior claim for aggravation of condition and a new claim, the Department's denial of the application to reopen for the

reason that the worker had sustained a new injury did not establish, as a matter of law, that the worker had sustained a new industrial injury. **....William Rodgers, 14,339 (1964)**

Prior Board decision in same claim

Where a prior Board decision involving the same claim required a determination of the exact amount of monetary pension benefits, and the determination of the worker's rate of time loss compensation was a critical part of that decision, the doctrine of collateral estoppel bars the Department from recalculating the pension benefits on remand when it discovers the time loss compensation rate was based on the incorrect number of hours worked per day. **....Eleanor Lewis (II), 89 2474 (1990)**

Superior court judgment in unrelated case

The Department was not barred from defending the constitutionality of a statute (RCW 51.08.178) even though a superior court in an unrelated case in which the Department was a party had previously held the statute unconstitutional. Since neither the claimant nor her employer were parties to the other action, the doctrine of collateral estoppel was held inapplicable. **....Lisa Soden, 85 2993 (1987)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 87-2-05759-3.]

COLLATERAL SOURCE RULE

(See EVIDENCE)

COMBINED EFFECTS

(See PERMANENT TOTAL DISABILITY)

COMMUNICATION OF DEPARTMENT ORDER

Address shown by Department records

A Department order must be sent to the worker's last known address as shown by the records of the Department. When the worker has notified the Department of a change of address to that of his attorney, an order sent to the claimant at his home address rather than in care of his attorney has not been "communicated" within the meaning of RCW 51.52.050. **....David Herring, 57,831 (1981)**

Failure to provide order to assignee of self-insured employer

Where the assignee of a self-insured employer did not inform the Department of its interest in the distribution of third party recovery until well after sixty days following the date of communication of the order to the employer, a later appeal filed by the assignee is not timely, and the Department's distribution order is binding upon the employer and its assignee. Where a law firm failed to specifically request a change of address to its care and has only informally communicated with the Department, the Department is not required by RCW 51.04.082 or RCW 51.52.050 to serve a copy of its order on the firm. **....Calvin Keller, Dec'd., 89 4546 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-01677-6.]

Failure to provide order to attorney or representative

The Department is required to send copies of orders to a party's representative. RCW 51.04.080 does not allow the Department to send a written notice, order, or warrant only to the worker and not to the worker's representative. **....Pamela Miller, 05 12252 (2006)**

Where an attorney or other representative has appeared before the Department on behalf of a firm and expressed desire to receive further communication from the Department regarding the assessment of industrial insurance taxes, the Department is obligated to direct all future correspondence to the firm's attorney or representative. **....Bell & Bell Builders (II), 90 5119 (1992)**

Failure to provide order to custodial parent

A custodial parent of a minor is an affected party with respect to an order issued in the minor's claim, and such an order will not become final until communicated to the parent. **....Andrew Gravlee, 06 16783 (2007)**

Failure to provide order to retrospective rating group

A retrospective rating group is a separate entity from an employer within the group, has an independent right to challenge adjudicative orders issued against an employer in the group, and the sixty-day limit for filing an appeal or protest does not begin to run until the order is communicated to the retrospective rating group. **....David Tapia-Fuentes, 06 15128 (2007)** *[Editor's Note: The Board's decision was appealed to superior court under King County Cause No.07-2-23740-2SEA]*

Presumptions of mailing and receipt

Proof that a Department order was mailed on a particular date, properly addressed and with sufficient postage, creates a presumption that the order was received in the due course of the mails. However, persuasive testimony that the order was not received will overcome the presumption. **....Edward Morgan, 09,667 (1959)**

Evidence that a Department order was mailed to the worker at his last known address gives rise to a presumption that the order was received by the worker in the due course of the mails. **....John Karns, 05,181 (1956)**

Where uncontradicted testimony indicates that the worker was not at the address to which the Department addressed its order, nothing in the record established communication of the Department order. **....Daniel Bazan, 92 5953 (1994)**

Receipt of copy of Department order

A Department order deposited in the worker's mailbox while she was out of state on vacation was not effectively communicated to her until she returned home. **….Dorena Hirschman, 09 17130 (2010)**

The brief display of a Department order to the employer at a deposition does not satisfy the statutory requirement that a copy of the order be served on the employer by the Department. Being shown the order does not constitute "communication" or receipt of the order. **....Larry Lunyou, 87 0638 (1988)**

Reference to an order in subsequent correspondence sent by the Department to the worker does not satisfy the requirement that a copy of the order must have been "communicated" to the worker. **....Elmer Doney, 86 2762 (1987)**

Strict compliance with service provisions (RCW 51.52.050)

Where the Department did not mail the claimant a copy of the closure order until after the final resolution of the employer's appeal from that order, the worker could appeal the order within 60 days of service even though the worker appeared in the employer's appeal and had actual knowledge of the contents of the order. [Department order affirmed in both appeals.] **....Mollie McMillon, 22,173 (1966)**

COMPUTATION OF BENEFITS

(See also LOSS OF EARNING POWER and TIME LOSS COMPENSATION)

Burial expenses

Like medical benefits, burial expenses are simply a reimbursement for services rendered as opposed to prescribed benefits payable to the worker or to surviving beneficiaries. Such expenses should be paid in the amount applicable at the time the burial services were performed. **....Melvin Christenson, Dec'd., 88 1477 (1991)**

Change of circumstances (RCW 51.28.040)

The statutory provision permitting the Department to readjust compensation does not, on its face, give the Department authority to readjust the compensation rate absent an application. Further, it requires a change in circumstances and does not apply where the Department had the correct wage information but simply failed to realize its error in computation. **....Eleanor Lewis (II), 89 2474 (1990)**

Support provided to dependents (RCW 51.32.050(5))

Since the expenses of maintaining the household were fixed and not reduced by her son's death, the entire amount of the deceased son's contributions, except amounts used for his food and clothing, should have been considered "support" in calculating the benefits payable to the dependent mother of the deceased worker. **....Stanley Hirsch, Dec'd., 20,797 (1964)**

CORPORATE OFFICERS, DIRECTORS AND SHAREHOLDERS

(See COVERAGE AND EXCLUSIONS)

COSMETIC DEFECT

(See PERMANENT PARTIAL DISABILITY and INJURY)

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

Abandonment

To decide whether a worker's intoxication evidenced an abandonment of employment the Board will consider evidence of the worker's tolerance for alcohol and demeanor, behavior and speech immediately prior to the accident. In the absence of such testimony, the intoxication, together with eyewitness testimony of erratic driving, is sufficient to establish that the worker had abandoned the course of employment by reason of intoxication **….Michael Pate, Dec'd., 97 1977 (1999)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 99-2-090250-9.]

Aggressor doctrine

The aggressor doctrine is generally applied in cases where an injury results from an assault which is an intentional act and not likely to be in furtherance of the employer's business, as opposed to acts of horseplay which may be an expected lunch period activity. **....Vince Polmanteer, 88 0362 (1989)** [dissent] [*Editor's Note*: The Board has abandoned the aggressor in favor of a broaden course of employment analysis as used in *In re Standley Murebu*, BIIA Dec., 37,335 (1972)

A worker injured during a fight which he instigated with his employer was not in the course of employment at the time of the injury. **....Peter Patterson, 53,306 (1980)** [*Editor's Note*: The Board has abandoned the aggressor in favor of a broaden course of employment analysis as used in *In re Standley Murebu*, BIIA Dec., 37,335 (1972)

A worker's single act of swinging his fist at a co-employee who had placed his hand on the worker's shoulder, when considered against the background of longstanding animosity between the two, including an exchange of sharp words earlier that day, was insufficient to remove the worker from the course of employment. **....Stanley Murebu, 37,335 (1972)** [*Editor's Note*: The Board has abandoned the aggressor in favor of a broaden course of employment analysis as used in *In re Standley Murebu*, BIIA Dec., 37,335 (1972)

"Arising out of employment" test distinguished

An off jobsite assault on a worker, possibly motivated by the fact he had crossed a striking employees' picket line, did not qualify as an industrial injury because the worker was not in the course of employment at the time. An "arising out of employment" test cannot be substituted for the "in the course of employment" test. **....Lloyd Gandee, 66,434 (1984)** [*See* RCW 51.08.180(1); RCW 51.08.013]

Deviation

Where recreational activities were pursued during earlier ammonia spills at an employer’s workplace, the employees reasonably believed that there was nothing wrong with recreational activities to kill time while awaiting instructions from the employer. A worker who injured his left knee when it buckled after he jumped to block a pass was in the course of his employment at the time of the injury since the injury occurred on company time and all were being paid to wait in the parking lot. For that reason, the Board concluded that the worker did not deviate from his employment when he played football during the work stoppage. **....Ricky Morgan, 94 1042 (1995)**

A driver's personal deviation is not imputable to the passenger/worker who is otherwise in the course of his employment**. ....Vernon Randall, 47,325 (1977)**

A worker's detour from his normal business route for personal reasons removed him from the course of employment so that his fatal accident during the personal side trip was not compensable. **....Larry Clure, Dec'd., 45,077 (1976)**

A deputy sheriff, eating a meal in a restaurant while on a business trip to pick up a prisoner, did not remove himself from the course of employment when he left his table momentarily to "remonstrate with a group of rowdies" at a nearby table and was assaulted. **....Thomas Hart, 35,767 (1971)**

Dual purpose doctrine

A worker injured commuting to work by her regular route was not brought within the course of employment simply because she intended to deposit mail for her employer enroute. The personal commuting trip would have gone forward and the worker would have followed the same route even in the absence of the business errand. **....Marlene Martin, 85 2862 (1987)** [dissent]

When a trip has concurrent business and personal purposes, the worker is in the course of his employment when he is injured during the trip. The business purpose need not be the primary cause of the trip. It is sufficient if someone at some time would have had to make the trip to carry out the business mission. **....Clayton Henneman, 55,132 (1980)**

A worker's detour from his normal business route for personal reasons removed him from the course of employment so that his fatal accident during the personal side trip was not compensable. **....Larry Clure, 45,077 (1976)**

Although a worker's trip to Hawaii was for the dual purposes of attending business seminars and vacationing, she was not in the course of employment when she was injured two days after the seminars had ended and during the vacation portion of the trip. **....Joanne Roberts, 40,893 (1973)**

The business purpose of a trip was not established where the worker's real motive was to see his wife rather than to purchase parts for his employer, and the trip would have been made even if the business purpose had failed. **....Robert Mathieson, Dec'd., 07,099 (1958)**

Education and training off jobsite

Travel to a first aid class which the employer required the worker to attend is within the course of employment**. ....Vernon Randall, Dec'd., 47,325 (1977)**

Going and coming rule

Because the school district and the school bus driver entered into an agreement to store a school bus at the worker's residence, the worker's driveway and parking strip are considered part of the employer's jobsite for purposes of the going and coming rule. **....Susan Luteman, 03 17468 (2004)**

Although security guard's injury occurred in the employer's parking lot prior to the time he was scheduled to begin work, he was at the time furthering his employer's interests by retrieving messages concerning employees whom he supervised and he was therefore in the course of employment under the "special errand" exception to the going and coming rule. **....Joseph Buchheit, 88 2674 (1989)**

A roadway used merely as an access road to and from the worksite by employees is not a part of the jobsite as defined in RCW 51.32.015 and RCW 51.36.040 unless the roadway is used or contracted for by the employer for the business process in which the employer is engaged. Coverage will not be extended under the Industrial Insurance Act to injuries occurring along a route to the worksite where the automobile accident was caused by the negligence of one of the drivers and not because the roadway itself contained some special hazard. *Distinguishing ITT Baking Co.* 77 Wn.2d 355 (1969) **....Guillermina Estrada, Dec'd., 68,514 (1989)** [*Editor's note*: The Board concluded the roadway was private, based on parties' stipulation and cited *Hein v. Longview Fibre Co*., 41 Wn. App. 745, 749 (1985) which involved a public roadway.]

A worker assaulted on a public street while traveling to work was not in the course of employment even though the incident may have been in retaliation for his having crossed a striking employees' picket line. **....Lloyd Gandee, 66,434 (1984)**

A worker's after hours trip to work to lock the day's receipts in the safe comes within the special errand exception to the going and coming rule since his travel was the most substantial task performed, in terms of inconvenience, time and effort. He was therefore in the course of employment at the time of his fatal accident enroute to the employer's premises. **....Brian Kozeni, Dec'd., 63,062 (1983)**

A worker's trip to work did not become a special errand simply because he was required to open his employer's plant when he arrived, as the trip would have been made in any event. The general rule that workers are not in the course of employment while going to and from work therefore applied to preclude compensation for the worker's fatal accident while commuting to work. **....Joseph McEvoy, Dec'd., 17,774 (1963)**

Goodwill

A shopping center security guard, injured while returning from investigating a car accident which had occurred on a public thoroughfare, was in the course of employment because he was furthering his employer's interests by fostering the general public's goodwill toward his employer. **....Larry Attwell, 53,756 (1981)** [dissent]

A worker injured while attempting to lift his employer's business associate during a beer break had removed himself from the course of employment**.** His participation in the beer break was not designed to foster goodwill between his employer and the business associate. **....Thomas Roe, 43,694 (1974)**

A salesman/truck driver, killed while helping his employer's customer start a stalled truck, was in the course of employment because he was creating goodwill in furtherance of his employer's business and was not serving any purpose of his own. **....Dallas Wayne Cockle, Dec'd., 23,791 (1967)**

Horseplay

A worker injured as a result of friendly horseplay initiated by his supervisor during their lunch period at a lumber mill was entitled to industrial insurance benefits because the activity did not constitute an unreasonable deviation from the course of employment. **....Vince Polmanteer, 88 0362 (1989)** [dissent]

A worker injured while attempting to lift his employer's business associate during a beer break was not in the course of employment**. ....Thomas Roe, 43,694 (1974)**

Intoxication

To decide whether a worker's intoxication evidenced an abandonment of employment the Board will consider evidence of the worker's tolerance for alcohol and demeanor, behavior and speech immediately prior to the accident. In the absence of such testimony, the intoxication, together with eyewitness testimony of erratic driving, is sufficient to establish that the worker had abandoned the course of employment by reason of intoxication **….Michael Pate, Dec'd., 97 1977 (1999)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 99-2-090250-9.]

Intoxication evidenced by a blood alcohol content of .16 did not remove the worker from the course of employment where the worker had an above average alcohol tolerance; normal demeanor, behavior and speech; was "fully about his wits"; and had his job duties uppermost in his mind. **....Brian Kozeni, Dec'd., 63,062 (1983)**

Intoxication evidenced by a blood alcohol content of .24 did not remove the worker from the course of employment where the worker had an above average tolerance for alcohol, was described as "sober and normal," and was still able to perform his work duties. **....Austin Prentice, 50,892 (1979)**

A watchman with a blood alcohol content of .29 was held to have abandoned the course of his employment where medical testimony indicated that such a high level of blood alcohol causes marked impairment in all people and lay testimony indicated that just prior to his death the worker's "walk was not normal, ... he seemed to weave, his actions seemed different, and he did not respond to the usual 'hello'." The only reasonable inference to be drawn from the evidence was that the worker fell into the water and drowned solely because of his state of intoxication. **....Al Thurlow, Dec'd., 20,254 (1967)**

Job site

Common entries that provide the only available route to work are premises used, occupied, or contracted for by the employer regardless of the use of the common entry by other businesses. **....Marilyn Webster, 03 18058 (2005)**

Lunch period (RCW 51.32.015; RCW 51.36.040)

A worker injured as a result of friendly horseplay initiated by his supervisor during their lunch period at a lumber mill was entitled to industrial insurance benefits because the activity did not constitute an unreasonable deviation from the course of employment. **....Vince Polmanteer, 88 0362 (1989)** [dissent]

Coverage during a lunch period on the employer's premises is no greater than during the work period. A worker is not entitled to coverage if the injury results from a wholly independent act of the worker for his own benefit, if the worker's act has no connection with his work or meal, and if the worker's act places him in a more dangerous position than was required of him during the meal period. **....Alfred Morrill, Dec'd., 29,704 (1970)** [special concurrence]

An injury sustained during a lunch period on the employer's premises is covered regardless of the worker's activity at the time of injury, even if that activity is solely for the worker's own accommodation or enjoyment. **....Herman Arnott, 24,755 (1965)**

"On call" employees

The mere fact that a worker is "on call" is insufficient, standing alone, to bring the worker within the course of employment where there is no showing that the "on call" status involved a substantial intrusion on personal time or that, at the time of injury, the worker was acting in furtherance of the employer's business. **....Joel Holly, Jr., Dec'd., 65,589 (1985)**

A ski instructor injured during a "free" skiing period was in the course of employment since the injury occurred during the hours of the ski school's operation, the employer encouraged skiing to familiarize the worker with the course, and the employer required the worker to be "on call" to give ski lessons. **....Laura Bechner, 45,777 (1976)**

Parking area exclusion (RCW 51.08.013)

A worker is acting in the furtherance of the employer's business when required to park in an employer-designated parking lot, subject to disciplinary action for non-compliance, and the employer's directive was issued in furtherance of its business interests. A worker injured in a parking lot, under such circumstances, is acting in the course of employment and the parking area exclusion of RCW 51.08.013 does not apply.
....Deborah Carey, 03 13166 (2004)

When injured in the parking lot while engaged in an activity to which the personal comfort doctrine applies (smoking), the worker remained in the course of employment and the parking lot exception did not require that the claim be denied.
....Janise Dial, 01 17217 (2003)

When ammonia spilled at the employer's bottling plant, the employer evacuated the workers and they were directed to await further instructions in the front parking lot. The employees pursued various activities--standing, sitting and talking, hitting tennis balls, reading or listening to music, eating lunches, and some played touch football. A worker who injured his left knee when it buckled after he jumped to block a pass was in the course of his employment at the time of the injury since the injury occurred on company time and all were being paid to wait in the parking lot. **....Ricky Morgan, 94 1042 (1995)**

A teacher slipped on ice as she carried class materials to the classroom. The materials were in her car trunk rather than in storage at a school less than a mile away to ensure that they would be accessible since they were essential to her job. The parking lot exception did not apply and that the worker was acting in the furtherance of the employer's business by transporting critical tools of the trade. **.....Julie Trusley, 93 3124 (1994)** (dissent)

Although security guard's injury occurred in the employer's parking lot, he was at the time furthering his employer's interests by retrieving messages concerning employees whom he supervised and he was therefore in the course of employment under the "special errand" exception to the going and coming rule. **....Joseph Buchheit, 88 2674 (1989)**

A worker injured while coming from a parking area was injured on the "jobsite" since the area in which the injury occurred was owned, operated and controlled by the employer, was the only practical route to the employer's plant, was used for purposes in addition to employee parking, and presented particular hazards likely to produce injury. **....Cathy Dickey, 64,560 (1984)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Benton County Cause No. 84-2-00625-8.]

A worker sustaining an injury in a parking area enclosed by a fence is not subject to the exclusion of RCW 51.08.013 where the injury occurred at a location within the enclosed area which was used exclusively for storage and not for parking.
....Michael Burnett, 49,588 (1978)

A road which provides access to a parking lot and which is also used for the delivery of materials to the employer's plant is not a "parking area". The exclusion of RCW 51.08.013 is therefore inapplicable to an injury sustained by a worker walking on that portion of the employer's jobsite. **....Harold Redman, 43,902 (1975)** [dissent]

Personal comfort doctrine

When injured in the parking lot while engaged in an activity to which the personal comfort doctrine applies (smoking), the worker remained in the course of employment and the parking lot exception did not require that the claim be denied.
....Janise Dial, 01 17217 (2003)

An attorney, who broke loose a dental crown when he bit into a piece of candy taken from a dish located on the reception desk of his employer, was injured in the course of employment. Injury-producing activity, though personal in nature, is still compensable under the "personal comfort doctrine" where it is reasonably incidental to the duties of the job. *Overruling In re Carol Rivkin*, BIIA Dec., 85 1694 (1986)
....Philip Carstens, Jr., 89 0723 (1990) [special concurrence]

A truck driver who remained on the employer's premises after hours to install a CB radio antenna for his personal use was not in the course of employment when he sustained an injury. The personal comfort doctrine was held inapplicable.
....Arie "Art" Vanderhoogt, 48,219 (1977**)**

Reaction to treatment for probable occupational disease

Home health care worker's negative reaction to medical treatment, undertaken when her patient was misdiagnosed as having tuberculosis, constitutes an occupational disease.

Risk of exposure was a distinctive condition of employment and treatment precautions undertaken by worker were in furtherance of the employer's interests and therefore occurred in the course of employment. **....Eleanor Groce, 87 3645 (1989)**

Recreational activities

A worker injured while playing on an employee softball team was not in the course of his employment, particularly where the employer provided no financial support to the team, exerted no control over the players who were not paid for their time and when the game did not occur on company premises during a lunch or recreation break. **....Christopher Phillips, 90 1386 (1991)**

Worker who injured his knee while playing on company football team was not injured in the course of employment where the employer paid for only the team's league entry fee, games were played off work hours and off work premises, the company name did not appear on jerseys, and no business was solicited through the team's participation in the league. **....Berry Rambeau, 89 1604 (1990)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 90-2-25386-4.]

Resident workers

An apartment manager who is on call 24 hours per day and has no fixed work hours is in the course of employment during the entire period of her presence on the premises. **....Christine Maier, 18,224 (1963)**

Sidewalk

A worker is not covered if injured on a sidewalk on the employer's premises unless the worker is in the course of employment at the time of the injury. A public sidewalk, even if owned by the employer, is not part of the jobsite unless it meets the definition of jobsite contained in RCW 51.32.015 and 51.36.040. **....Eileen Cleary, 92 1119 (1993)**

Training programs

Where a participant in an employer-sponsored training program appears to be acting under an implied contract of employment, which includes provisions for termination for absences or limitation from access to future employment with the employer, the participant is within the course of employment if she sustains an injury during the program. **....Kimberly Bemis, 90 5522 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 92-2-12714-8.]

COVERAGE AND EXCLUSIONS

(See also EMPLOYER-EMPLOYEE and INDEPENDENT CONTRACTORS)

Chore service workers

Where a worker serves as a chore service worker on behalf of the Department of Social and Health Services (DSHS) and provides services to a particular individual and DSHS does not determine the rate of compensation or the number of hours worked, DSHS is not the employer at the time of injury. **....Beryl June Davis, 90 3688 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 9192-2-14920-6.]

Corporate officers (RCW 51.12.020(a) (1979); RCW 51.12.020(8) (1987)(1992))

Under the 1991 amendments to RCW 51.12.020(8), in order to be excluded from coverage a corporate officer must be a bona fide officer, voluntarily elected, and must exercise substantial control in the daily management of the corporation. **....Amos Hammer Cutting, Inc., 05 14484 (2006)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 06-2-00915-8.]

Corporate officers, elected and empowered by the articles of incorporation or by-laws, who are also directors and shareholders, are excluded from the mandatory coverage of the act pursuant to RCW 51.12.020(8)(1987), provided that they have voluntarily assented to such status. Analysis of *New West*, concerning 1979 version of RCW 51.12.020, is equally applicable to 1987 version as changes were only technical and there are no substantive distinctions between the two versions of the statute. **....Western Gold Shake, 89 3349 (1990)** [dissent] [*Editor's* Note: See later statutory amendments, Laws of 1991, ch. 246, § 4 (effective January 1, 1992) and *In re Amos Hammer Cutting Inc*, BIIA Dec., 05 14484 (2006). *Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 90-2-02907-4.]

Corporate officers, elected and empowered by the articles of incorporation or by-laws, who are also directors and shareholders, are excluded from the mandatory coverage of the Act pursuant to RCW 51.12.020(9) (1979), provided that they have voluntarily assented to such status. The statute imposes no limitation on the number of corporate officers who can be so excluded; the statute does not require any minimum stock ownership; and the statute does not require that officers who are excluded from mandatory coverage exercise substantial control over the business operation.
....New West Manufacturing, Inc., 88 3634 (1989) [dissent] [*Editor's Note:* See later statutory amendments to RCW 51.52.020(8), Laws of 1991, ch. 246, § 4 (effective January 1, 1992) and *In re Amos Hammer Cutting Inc*, BIIA Dec., 05 14484 (2006)]

Course of trade, business or profession of employer (RCW 51.12.020(3))

Two laborers hired by a dentist to remodel railroad cars over a six-year period for the purpose of housing the dentist's ongoing dentistry practice were mandatorily covered workers and the remodeling effort was in the course of the dentist's profession in light of the duration of the employment relationship and the "ongoing," rather than prospective, nature of the business. **....John Ryan, 86 1153 (1987)**

Effect of allowed Federal Employees Compensation Act claim

Where a claimant developed asbestos-related disease due to exposure at a variety of employers due to exposure at different employers between 1952 and the mid-1980s, the Department's rejection of a claim due to the allowance of a Federal Employees Compensation Act [FECA] claim was in error since the Department was responsible for interim treatment benefits under the asbestos fund while it identified the liable insurer. Noting the result may be different under the provisions of RCW 51.12.102(1) if coverage is provided under the Longshore and Harbor Workers' Compensation Act, the Department should pursue the federal program on the claimant's behalf, if appropriate. **....Richard Corkum, 90 0280 (1991)**

Elective adoption

By failing to pay premiums for elective coverage when filing a quarterly report, the limited liability company canceled elective coverage effective the date the Department received the quarterly report. ….J D I, LLC, 09 18829 (2010)

An officer and shareholder of a corporation is covered under the elective adoption provisions of RCW 51.12.110 where, when the corporation was first formed, he was not a shareholder and was therefore subject to the mandatory coverage provisions of the Act, and the corporation continued to report his hours and remit the required premiums after he became a shareholder. Under these circumstances no formal notice of elective adoption was required under RCW 51.12.110. **....Richard Wooding, 67,593 (1985)**

Extraterritorial

Under a collective bargaining agreement that provides a claim would be processed in Illinois but also allows the worker to file in any other state that has jurisdiction, the worker was entitled to an allowed claim under the Washington Industrial Insurance Act because there was a sufficient nexus between the worker and the State of Washington notwithstanding the fact that the worker also filed a valid claim in Illinois. **….Irene Uzzell, 09 18171 (2010)**

The enactment of RCW 51.12.120 regarding extraterritorial coverage did not abrogate the requirement that a worker be employed by an "employer" within the meaning of RCW 51.08.070. Thus, the extraterritorial coverage provisions do not apply unless the employer is engaged in doing business in this state. **....Kenneth Hermanson, Dec'd., 42,395 (1975)**

Federal Employees Compensation Act

Allowance of a federal hearing loss claim precludes acceptance of a state claim. A worker loses any right to benefits under Title 51 if the person has a valid claim arising from the Federal Employees Compensation Act. **....John Sikes, 02 13513 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under Clallam County Cause No. 04-2-00669-7]

Inmates

County jail inmates who perform work as trustees are not 'volunteers' as defined by RCW 51.32.035 **….David Wissink, 00 21485 (2002)** [*Editor's Note*: The Board's decision was appealed to superior court under Stevens County Cause No. 02-2-00049-3] [*Reversed, Stevens County v Department of Labor & Indus.*, (In the Matter of David J.) 118 Wn App 870 (2003). The Board's decision *In Re David J. Wissink* was reversed by division three of the Court of Appeals in Wissink, 118 Wn. App. 870 (2003).]

Interstate truckers – Owner-operators

Drivers who sign a lease-back agreement but do not have a significant economic interest in the truck covered under the agreement are not exempt from coverage as owner-operators who lease their truck to a common carrier under RCW 51.08.180. *Distinguishing Department of Labor & Indus. v. Mitchell Brothers Truck Line, Inc.*, 113 Wash. App. 700 (2002). **....Dale Sanders Trucking Co., 07 11358 (2008)**

Jockeys

The worker employed as an exercise rider is not covered under the Act when preparing a horse for a race during a race meet. WAC 296-17-239, WAC 296-17-45001, WAC 296-17-73105. **….Richard Ochoa, 96 2423 (1997)** [dissent] [*Editor's Note:* The facts are almost identical to those described in *In re John Heath*, BIIA Dec., 68,742 (1985) and *In re Rick Obrist*, BIIA Dec., 68,775 (1985), but WAC 296-17-239 and new rules warrant a different result. The Board's decision was appealed to superior court under Spokane County Cause No. 97-2-05018-3.] [*Reversed, Ochoa v. Department of Labor & Indus*., 143 Wn. 2d 422 (2001)]

Jockeys injured while employed as "exercise boys" are subject to the mandatory coverage provisions of the Act notwithstanding the jockey exclusion of RCW 51.12.020(7). **....John Heath, 68,742 (1985)** [dissent];
Rick Obrist, 68,775 (1985) [dissent]

Limited liability company

Limited liability companies are not the same as corporations or partnerships for industrial insurance purposes and they are not excluded from coverage. **....David Brooks, Dec'd., 96 4438 (1998)** [dissent] [*Editor's Note*: Laws of 1999, ch. 68, (effective July 25, 1999) codified as RCW 51.12.020(13) allows limited liability companies the same treatment as corporations and partnerships for coverage under industrial insurance.]

Longshore and Harbor Workers' Compensation Act

A claim should not be rejected on the basis the injury occurred while in the course of employment subject to federal jurisdiction as the last injurious exposure rule was not intended to apply as a basis to deny a state claim. The Department is required to determine the nature and extent of the worker's in-state employment and whether any of such employment impacted the worker's condition and, pursuant to RCW 51.12.100(4), may provide interim benefits pending a final determination. **....John Robinson, 91 0741 (1992)** [*Accord, Department of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304 (1993)

Widow who makes a prima facie showing, however slight, that her husband suffered injurious exposure to asbestos in employment covered by Title 51 RCW, is entitled to

benefits pursuant to RCW 51.12.102(1), even though the evidence indicates the federal Longshore and Harbor Workers' Compensation Act insurer will ultimately be responsible for the claim. **....Dorothy Gula, Dec'd., 88 2196 (1990)**

The Department must make its own determination regarding federal coverage, rather than wait for the pending federal claim to be resolved. [RCW 51.12.100]. **....David Buren, 65,127 (1984)** [*Editors Note:* See later statutory amendments, Laws of 1988, ch. 271, § 1 (RCW 51.12.102)]

Partners (RCW 51.12.020(5))

In determining whether limited partners are excluded from mandatory coverage pursuant to RCW 51.12.020(5) the Board considers the intent of the parties, as evidenced by their agreement, their acts and conduct, and all the facts and circumstances of the case. Where there was no sharing of profits and losses, the working relationship between the individuals was in reality that of employer and employees, and the sole purpose of the partnership agreement was to evade the benefits and burdens of the Industrial Insurance Act in contravention of RCW 51.04.060, the limited partners were held to be "workers" subject to mandatory coverage under the Act. **....K E W Construction, 87 0152 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No.88-2-02759-2.]

Reciprocity agreements

A person who works at a Washington State place of business of an Idaho employer and is domiciled in Washington, is a Washington worker covered by the Washington Industrial Insurance Act pursuant to the reciprocal agreement between Washington and Idaho (WAC 296-17-31009). ….Athena Eisele, 09 10809 (2010)

Worker hired by an Oregon corporation and transported to Washington where he was killed while harvesting corn, was not covered by Washington's Industrial Insurance Act. Under the terms of the reciprocity agreement permitted by RCW 51.12.120(6) and RCW 51.04.020(9) the worker was an Oregon employee, "temporarily" employed in Washington, and therefore subject to Oregon's Workers' Compensation Law. **....Clifford Perkins, Dec'd., 89 2047 (1990)**

Religious or charitable organizations

Church members engaged in a church tree-planting operation and receiving only a small personal stipend in addition to the basic necessities of food, clothing and shelter, are not engaged in employment subject to the mandatory coverage of the Act and are specifically excluded from coverage by RCW 51.12.020(4). **....Gospel Outreach, 45,742 (1977)** [dissent]

Self employment

A claim should not be rejected on the basis the condition developed while the worker was self-employed and not covered by the industrial insurance laws as the last injurious exposure rule was not intended to apply as a basis to deny a claim. The Department is required to determine the nature and extent of the worker's covered employment to determine whether any of such employment impacted the worker's condition. (*Citing In re John L. Robinson*, BIIA Dec., 91 0741 (1992) (federal) and *In re Gary Peck*, Dckt No. 91 6243 (January 19, 1993) (another state)). **....Louis Williams, 92 4110 (1993)**

Social events

A worker engaged in activities related to preparation of an employer's social event is not participating in a social event within the meaning of the exclusion from coverage contained in RCW 51.08.013(b). **....Sharon Rice, 07 18132 (2008)**

Sole proprietors (RCW 51.12.020(5))

Whether an independent contractor is exempt from coverage under the sole proprietor exclusion of RCW 51.12.020(5) depends upon factors such as whether the person (1) has a principal place of business eligible for a business deduction for IRS purposes, (2) maintains a separate set of books or records reflecting income and expenses, (3) has done everything legally necessary to establish a business in the state of Washington, (4) has obtained necessary licenses and tax identification numbers, (5) provides services to more than one person or entity, and (6) holds him or herself out to the general public as an independent business person. An additional consideration is "which way does the money flow?" **....Fiedler Industries, 89 0822 (1990)** [*Editor's note:* See later statutory amendments, Laws of 1991, ch. 246, § 1 (effective January 1, 1992)]

Waiver of benefits (RCW 51.04.060)

RCW 51.04.060 invalidates a contractual agreement to the extent that it purports to exclude a worker from coverage who would otherwise be covered by the Industrial Insurance Act. It is inappropriate, however, to rely on RCW 51.04.060 to make the threshold determination whether the employment relationship is within the coverage of the Act. **....Rainbow International, 88 2664 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 90-2-00248-6.]

CRIME VICTIMS COMPENSATION

(See TIMELINESS OF CLAIM)

Burden of proof – injury resulting in death

When an injury results in the death of a crime victim, RCW 7.68.070(3) requires that beneficiaries' evidence must give rise to only an initial inference that the death was due to an injury received as a result of a crime. Additional proof is not required of the beneficiary unless the Department presents evidence that, if unrebutted, creates a reasonable inference that the victim was attempting to commit or committing a felony when fatally injured. **….TJR, 99 C0080 (2001)** [dissent]

Temporary total disability benefits

The victim of a criminal act who is not employed at the time of the criminal act is not entitled to temporary total disability benefits. RCW 7.68.070(3). The date the criminal act occurred that gave rise to benefits is the date used to determine eligibility for temporary total disability benefits, not the date the crime is reported to law enforcement officials or the date that the memory of the criminal act is recovered. **....Caitlin Thomas, 94 C096 (1995)**(dissent)

CUSTODY OF CHILDREN

Invalid child in custody of state institution (RCW 51.32.010 and RCW 51.32.020)

Under RCW 51.32.010 and .020, compensation could not be paid to the noncustodial worker parent on account of an invalid child in a state institution. The question of whether the state institution having custody of an invalid child should receive compensation on the child's account was left unanswered. **....Jacob Masseth, 07,822, (1957)**

Determined by court order

A court order granting the worker's wife custody of their children during the pendency of a divorce action determines the custody of the children for purposes of RCW 51.32.010. The wife, not the worker, was therefore entitled to back pension payments on the children's account during a reconciliation period when the worker returned to live with the wife and children. **....Walter Brown, 41,766 (1974)**

DENIAL OF APPEAL

(See DEPARTMENT, PETITIONS FOR REVIEW)

DEPARTMENT

(See also ASSESSMENTS)

Administration costs, self-insurers

The Department lacks authority, under RCW 51.44.150, to assess a self-insured employer for the under collected actual administrative costs associated with the self-insurance program for a period before the employer was certified as self-insured. **....Whatcom County, 87 0826 (1988) [***Affirmed sub nom, Department of Labor & Indus. v. American Adventures, Inc*., 59 Wn. App 790 (1990)]

Administrative convenience

The Department must fairly determine the extent of benefits owed injured workers in Washington State as well as outside the state and its obligation is not met when administrative convenience prevails over claimant's life situation. The Department cannot refuse to schedule an examination in Mexico for administrative purposes since a Mexican doctor would not be easily available to testify at a hearing in a circumstance where the worker resided in Mexico and was unable to obtain visa for legal entry. **....Ramiro Madrigal, 91 2559 (1993)** [*Note*, RCW 51.32.110 (6) was changed by Laws 1997 Ch 325 §2]

Agreed examination

A closing order based on an examination agreed to by the worker and the Department is not ultra vires simply because no regulation authorized an agreed examination. *Citing In re Rafael Rodriguez*, BIIA Dec., 90 3308 (1991), such agreements are encouraged although the employer should be included in the process. **....Anthony Murphy, 94 1233 (1996)**

Ambiguous orders

When the Department issues an order affecting the finality of an earlier order, the effect of the original order may not be revived by a third order unless the third order is drafted in such a way that it unambiguously states the Department's final action. **....Robert Kleest, Jr., 02 13352 (Order Granting Relief on the Record, May 7, 2002)**

The Department's language closing a claim "without further award for permanent partial disability" is inherently ambiguous when the order is issued after reconsideration of a previous order paying an award for permanent partial disability. In such circumstance, it is impossible to determine if the Department intended that the award be paid and the doctrine of res judicata likely does not apply to the ambiguous determination. **....Brett Kemp, 02 13145 (2003)**

Authority of Department not to pursue collection of final assessment

The Department does not have the authority to withdraw a Notice and Order of Assessment which has become final. However, the Department may still, at any time, elect not to pursue collection of the sums assessed thereby. Board construed Department's order withdrawing Notice and Order of Assessment which had become final as a decision by the Department not to pursue collection of the sums assessed, making the employer no longer obligated on the indebtedness asserted by the Notice and Order of Assessment. **....Thong Quach dba QT&T Co., 89 0055 (1989)**

Authority to adjudicate claim after closure

After its order closing a claim with time-loss compensation as paid becomes final, the Department lacks subject matter jurisdiction to respond to protests regarding time-loss compensation payment orders issued prior to the date of closing. **….Randy Jundul, 98 21118 (1999)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 00-2830-0KNT].

Authority to adjudicate claim after closure – medical bills

After claim closure, the Department retains authority to pay and review payment of medical bills related to treatment rendered before claim closure. **….Kimberly Nelson, 00 18243 (2001)**

Authority to bind parties to final disposition - See **APPEALABLE ORDERS** Department Agreed Exam

Authority to honor support enforcement lien

The Department is under no obligation to notify the worker that it will be honoring a support enforcement lien prior to making payments to the Office of Support Enforcement. **….Elizabeth Schaefer, 00 12023 (2001)** [*Editor's Note*: The Board's decision was appealed to superior court under Clallam County Cause No. 01-2-00431-2.]

Authority to issue further adherence order

Once the Department has issued an order, its authority to take further action with respect to such order is limited by RCW 51.52.050 and RCW 51.52.060. Absent the filing of a protest or request for reconsideration, the Department cannot simply issue a further order which only adheres to the provisions of the original order. In such case, the adherence order is a nullity. [*In re Thomas Houlihan*, BIIA Dec., 67,414 (1985)]
....Richard Wagner, 88 0962 (1988)

Authority to issue nunc pro tunc order

The Department cited an employer for four safety violations and issued a Corrective Notice of Redetermination assessing a $6,000 penalty arising out of an incident where a worker was electrocuted. In a separate investigation, the Department apparently determined it had been too lenient on the employer and, more than 60 days after issuance of the unappealed Corrective Notice of Redetermination, issued a *nunc pro tunc* order vacating the Corrective Notice of Redetermination. The Board concluded there was no statutory authority to issue a *nunc pro tunc* order. **....American Neon Signs, 94 W346 (1995)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 9202094624-5.]

Authority to issue order while superior court appeal pending

Pursuant to RCW 51.52.110 a superior court appeal is not an automatic stay of the Board's decision. The Department has authority to administer the claim consistent with the Board's decision. Despite that authority, neither the Board nor the Department has jurisdiction to reconsider the subject matter of the order that is on appeal to superior court
…Steven Carrell, 99 11430 (1999)

Authority to issue subsequent order once the period for appeal has passed

Once the 60-day appeal period expired, a Department order became final and binding on all parties, including the Department. As a result, the Department's effort to "modify from final to interlocutory" an unappealed order was invalid, although it could recoup monies paid due to clerical error. **....Martina Peterson, 94 0991 (1995)**

Authority to issue subsequent order while appeal pending

It is erroneous as a matter of law for the Department to adjudicate claim closure when adjudication regarding segregation of a condition is pending. To that extent, *In re Larry Nelson*, BIIA Dec., 89 0257 (1999) is overruled in the sense that it determined that the Department "lacks jurisdiction" to adjudicate a claim in such circumstances.
....Betty Wilson, 02 21517 (2004)

Entry of a subsequent order that affirms an order that paid time loss compensation benefits does not deprive the Board of jurisdiction over issues raised by the appeal of the order closing the claim. **….Ronald Watson, 96 5309 (1997)**

An appeal from a Department order does not necessarily deprive the Department of jurisdiction to issue subsequent orders on other aspects of an open claim which are not covered by the order on appeal. **....Larry Nelson, 89 0257 (1990)** [Editor's Note: *Overruled in part, In re Betty Wilson,* BIIA Dec., 02 21517 (2004)]

Authority to modify order

Under RCW 51.52.060 the time within which the Department can modify or hold in abeyance a prior order is the "time limited for appeal." This "time" is not 60 days from the date shown on the order, but rather, 60 days from the date the order was communicated to the aggrieved party. **....Kenneth Osborne, 69,846 (1986)** [special concurrence] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 86-2-20322-2.]

Authority to recoup overpayment of benefits – See also **SELF-INSURANCE** Authority to recoup overpayment of benefits

The Department's failure to include employer-paid health care benefits in a wage calculation is an adjudicator error as referenced in RCW 51.32.240 because the adjudicator must make a decision as to whether the wages should include the employer-paid health insurance benefit in the monthly wage calculation. The failure to look at the appropriate documents is not a clerical error. **….Flora Lacy, 08 21768 (2009)**

Because the self-insured employer's administrator knew of the circumstances that should have caused a discontinuation in time loss compensation payments, the payments were issued pursuant to adjudicator error and do not fall within the constraints of RCW 51.32.240(1)(a). **….Anthony Womack, 08 12365 (2009)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County by claimant Cause No. 09-2-09874-9, employer Cause No. 09-2-09991-5]

Deducting 100% of current time-loss compensation payments as recoupment of an overpayment of permanent partial disability is incorrect as a matter of law. **….Jason Honsowetz, 08 18940 (2009)**

If the Department paid the worker benefits that a self-insured employer should have paid, RCW 51.32.240 does not allow the Department to recoup the erroneously paid benefits from the self-insured employer. **….Dan Dinescu, 07 12380 (2009)**

When the self-insured employer has previously paid time-loss compensation benefits for a period after the effective date of the pension, the Department's authority to use the second injury fund for pension payment includes the authority to reimburse the self-insured employer from the second injury fund for payment of the total disability benefits. Recoupment or offset of the overpayment of total disability benefits is the responsibility of the Department of Labor and Industries. **…Frederic Cuendet, 99 21825 (2001)**

The Department attempted to recoup the worker's medical expenses that were incurred before the Board determined that he was permanently and totally disabled, but after the effective date of the pension. The bills for medical treatment were properly payable by the Department and, accordingly, are not subject to recoupment. RCW 51.32.240 does not give authority to the Department to recoup from the worker payments made to medical providers, since the recoupment statute only authorizes recoupment from the recipients of the payments. *Distinguishing In re Esther Rodriguez,* BIIA Dec., 91 5594 (1993) **….Anthony Lajcin, 99 12440 (2000)**

Once the 60-day appeal period expired, a Department order became final and binding on all parties, including the Department. As a result, the Department's effort to "modify from final to interlocutory" an unappealed order was invalid, although it could recoup monies paid due to clerical error. **....Martina Peterson, 94 0991 (1995)**

Where an order allowing a claim is final, the Department may vacate the order on the basis of fraud but the Department cannot issue an order seeking recoupment under the terms of RCW 51.32.240 where more than a year had passed since discovery of the fraud. **....Keith Hunt 92 6213 (1994)** [*Editor's Note*: Legislative changes to RCW.51.52.240 includes use of the term "willful misrepresentation" rather than "fraud" and allows three years of recoupment on discovery of willful misrepresentation. The Board's decision was appealed to superior court under Pierce County Cause No. 94-2-01893-6.]

In the context of the Department's calculation of the offset of a previously paid permanent partial disability award against the pension reserve, where the Department had also paid an additional award for permanent partial disability by an order which never became final, the Department could deduct the erroneously paid permanent partial disability -- which was neither a permanent partial disability or temporary total disability award -- from time-loss compensation benefits under RCW 51.32.240(3). **....Esther Rodriguez, 91 5594 (1993)** [Editor's Note: Considered application in light of *Stucky v. Department of Labor & Indus*., 129 Wm.2d 289 (1992).]

Authority to regulate out-of-state providers – See **PROVIDERS**

Delegation of authority to issue Notices and Orders of Assessment – See **ASSESSMENTS**

Delegation of authority to receive protests and requests for reconsideration – See **PROTESTS**

Determination of new injury vs. aggravation (WAC 296-14-420) – See also **JOINDER** Department as necessary party

Where a self-insured employer asserts that a worker's condition was the result of a new injury rather than an aggravation of the condition causally related to the industrial injury for which the employer was responsible, a Department order which included only the signature of the claims manager does not comply with WAC 296-14-420. To meet the requirements of WAC 296-14-420, the Department order must reflect that it is a single determination made jointly by the assistant directors for claims administration and self-insurance. **....Bennie Johnson, 91 4040 (1992)**

Employer inclusion in claims administration

A closing order based on an examination agreed to by the worker and the Department is not ultra vires simply because no regulation authorized an agreed examination. *Citing In re Rafael Rodriguez*, BIIA Dec., 90 3308 (1991), such agreements are encouraged although the employer should be included in the process. **....Anthony Murphy, 94 1233 (1996)**

Ministerial orders

A Department order that purports to follow a finding of fact contained in a Board order is not ministerial unless the Board also directed the Department to take specific action consistent with the finding of fact. **....Keith Browne, 06 13972 (2007)**

Providers – See **PROVIDERS**

Reassumption of jurisdiction (RCW 51.48.131) – See **ASSESSMENTS**

Reassumption of jurisdiction (RCW 51.52.060)

Pursuant to holding in *In re Russell Randall*, BIlA Dec. 90 3634 (1990), the Department may reassume jurisdiction once in response to a notice of appeal, not twice; the inability to reassume jurisdiction a second time prohibits the Department from reconsidering the same issue twice. If the second notice of appeal raises an issue not raised when the Department first reassumed jurisdiction, the Department is not precluded from reconsidering the new issue. **....Antonia Bustos, 96 5971 (1996)**

The prohibition contained in RCW 51.52.060(4) that precludes the Department from issuing an order holding in abeyance the terms of an order issued pursuant to RCW 51.32.160 does not apply when the Department has been requested to reconsider the order under the authority of RCW 51.52.050. **....Joseph Brown, 96 4577 (1996)**

RCW 51.52.060(4) as amended in 1995 prohibits the Department from issuing an order that holds in abeyance the terms of an order issued under RCW 51.32.160 when more than 90 days have passed since an application to reopen has been filed. **....Nancy Stumbaugh, 95 7068 (1996)**

Department's failure to act to modify, reverse or change its assessment decision within thirty days of receipt of the employer's appeal renders all subsequent orders null and void and vests jurisdiction with the Board even though the Department failed to forward the appeal to the Board. **....Maid-For-You, 88 4843 (1990) [***Editor's note*: Consider impact of *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994) on determination that orders are "null and void."]

Where the Department has held an order which has been appealed to the Board in abeyance pending further consideration, it must enter a further order within the time allowed by RCW 51.52.060. However, the failure of the Department to issue a further order within the time allowed does not make the order held in abeyance appealable. Such order is not a final order of the Department. **....Coni Oakes, 90 1968 (1990)**

Where the Department has issued a further determinative order under RCW 51.52.060 which affirms the order previously appealed to the Board it may not, in the event of a further appeal to the Board, hold such order in abeyance pending further consideration. RCW 51.52.060 allows the Department to reassume jurisdiction once, not twice, and it may not, on its own motion, artificially extend the time allowed by the Legislature to reconsider its decision once an appeal is filed with the Board.

....Russell Randall, 90 3634 (1990)

The provisions of RCW 51.32.160, as amended in 1988, which render an application to reopen a claim "deemed granted" if an order denying the application is not issued within 90 days of receipt of the application, do not apply where the Department denied the application within the time allowed but, following the filing of an appeal, reassumed jurisdiction over the claim and held its order denying the application in abeyance. **....Edna Shore, 89 5898 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Clallam County Cause No. 91-2-00740-6.]

Where the Department has held in abeyance an order previously appealed, pursuant to the provisions of RCW 51.52.060, and issued a further affirming order after the time allowed for doing so has passed, it may not thereafter hold such order in abeyance for further consideration. The Department cannot artificially extend the time for reconsideration as allowed by the Legislature. **....Cortez Tyler, 90 3483 (1990)**

Whether the Department has taken further action in response to a notice of appeal "within thirty days after receiving a notice of appeal" is determined by the date it made its further decision and not by the date the decision was mailed to the parties. RCW 51.52.060. **....Benson Wood, 90 1810 (1990)**

Reassumption of jurisdiction – WISHA - See **SAFETY AND HEALTH** Reassumption of jurisdiction by Department

Rules

Rules enacted by the Department that interpret RCW 51.08.178 are interpretive rules and do not have the force of law when disputed in the course of an appeal. **....Fred Jones, 02 11439 (2003)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 03-2-04618-7.]

WAC 296-17-349 (effective April 1, 1988), which purports to limit the corporate officer exemption to officers "who are in a position similar to a proprietor to direct and control the business," is beyond the authority of the Department. The Legislature had the opportunity to adopt language remarkably similar to that of WAC 296-17-349 and determined not to do so. An administrative agency does not have the power to make rules which, rather than applying legislative enactments, attempt to amend or change them. **....Western Gold Shake, 89 3349 (1990)** [dissent] [*Editor's Note:* See later statutory amendments to RCW 51.52.020(8), Laws of 1991, ch. 246, § 4 (effective January 1, 1992)]

Void order

Once an order allowing the claim became final, the Department may not set aside the allowance of a claim by an order rejecting the claim on the basis that a worker's condition was not the result of an injury or occupational disease and directing repayment of time-loss compensation with no reference to fraud where the Department had already issued an order allowing the claim which had become final. An order which attempts to do so is *void ab initio* and cannot direct repayment of benefits under the terms of RCW 51.32.240(1). **....Keith Hunt 92 6213 (1994)** [*Editor's Note*: Consider impact of *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1995). The Board's decision was appealed to superior court under Pierce County Cause No. 94-2-01893-6.]

DEPOSITIONS

A deposition taken in accordance with WAC 263-12-115(9) may be published without the necessity of establishing the witness' unavailability under CR 32(a)(3).
....Patricia Richmond, 63,064 (1983) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 84-2-00893-8. Rules pertaining to deposition are now found in WAC 263-12-117.]

DIMINUTION OF DISABILITY (RCW 51.32.160)

Nothing in the Industrial Insurance Act precludes a worker who is receiving a permanent total disability pension from engaging in employment which is not "gainful." Part-time employment paying less than full-time employment at minimum wage may not be gainful. Therefore, unless medical evidence of diminution of disability is presented or evidence establishes the worker has returned to "gainful" employment, pension benefits cannot be terminated.
....Norman Pixler, 88 1201 (1989) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 89-2-04666-5.]

DISCOVERY

Applicability of civil rules -- medical experts

Attorney for self-insured employer engaged in *ex parte* contact with a forensic medical witness identified by the claimant. The witness had no contact with the claimant during the course of claim administration. The Board held that such ex parte contact violates CR 26(b)(4) and is objectionable. **....Jesse Gish, Jr., 89 0914 (1990)** [*See also*, legislative restriction on contact with medical providers, RCW 51.52.063.]

There is no physician/patient privilege in workers' compensation claims. RCW 51.04.050. RCW 51.36.060 only applies during claims administration; it is not a discovery tool to be used during an appeal before the Board. During the pendency of such an appeal, the civil rules of discovery apply. However, a party is not required to use the discovery rules in order to confer with a witness identified, in good faith, as that party's own witness. In addition, because of the absence of the physician/patient privilege pursuant to RCW 51.04.050, doctors are not precluded from having ex parte contact with the Department or the employer. At the same time, however, RCW 51.36.060 cannot be used to require a doctor to engage in such ex parte contact. If a doctor decides not to engage in ex parte contact, the discovery rules must be used. CR 26 and relevancy considerations may impose further restrictions with respect to physicians who are not named as witnesses. **....Adelbert Farr, 88 0699 (1989)** [*Affirmed on other grounds, sub nom, Weyerhaeuser v. Farr*, 70 Wn.App. 759 (1993) Holding on collateral

source rule overruled by *Johnson v. Weyerhaeuser*, 134 Wn. 2d 795 (1998) *See also*, legislative restriction on contact with medical providers, RCW 51.52.063.]

Motion to compel

A motion to dismiss or compel discovery should not be considered unless there is compliance with the notice requirements of CR 37(a). In light of the discovery deadline, even if proper notice had been provided, the discovery request served the day before discovery was to be completed should not result in sanctions. In addition, the employer must be allowed the opportunity to be heard on the issue of the attorney fees. **....Jason McClure, 94 0569 (1995)**

Physician-patient privilege

There is no physician-patient privilege with respect to workers' compensation claims. RCW 51.04.050. **....Adelbert Farr, 88 0699 (1989)** [*Affirmed* on *other grounds, sub nom, Weyerhaeuser v. Farr*, 70 Wn.App. 759 (1993) Holding on collateral source rule overruled by *Johnson v. Weyerhaeuser*, 134 Wn. 2d 795 (1998)]

Protective order

Protective orders pertain to discovery under the Civil Rules of Procedure. They are not to be used to sanction a party. Absent a request from a party, it is error for the industrial appeals judge to issue a protective order. **….Charles Montee, 08 19218 (2010)**

Sanctions – See **SANCTIONS** Discovery

Testifying v. consulting experts

Although originally designated as a testifying expert, a party may re-designate an expert as a consulting expert, and the expert's opinions are shielded from discovery and use by the opposing party, so long as the expert is properly classified as a consulting expert under CR 26. **….Virginia Ayers, 08 14932 (2009)**

DISCRETIONARY DECISIONS

(See AGGRAVATION, MEDICAL BILLS, PENALTIES, SCOPE OF REVIEW, STANDARD OF REVIEW, THIRD PARTY ACTIONS and VOCATIONAL REHABILITATION)

EMPLOYER-EMPLOYEE (RCW 51.08.070; RCW 51.08.180)

(See also COVERAGE AND EXCLUSIONS and INDEPENDENT CONTRACTORS)

Choreworkers

A worker who provided in-home child care to her sister's children was approved as a DSHS provider. Because the worker consented to the employment and reasonably believed she worked for DSHS, the Board concluded that she was employed by DSHS and not by the father of the children. *Citing Jackson v. Harvey*, 72 Wn.App. 507 (1994) *review denied*, 124 Wn.2d 1003 (1994). **....Sylvia Booth, 92 6148 (1995)** (dissent)

Home remodeling contractors

Entrepreneurs selling remodeling packages to homeowners are not "salesmen" employees of a remodeling center whose services they regularly use, where the entrepreneurs are under no obligation to use the remodeling center's services exclusively, and frequently contract with other remodeling centers, or hire their own labor to perform the installation of materials purchased from this or other suppliers. Neither the "right of control" test nor the "nature of the work" test for determining the existence of an employer-employee relationship is satisfied. **....Crescent Remodeling Center, 66,160 (1985)** [special concurrence]

Home services provider

A worker participated in a DSHS-sponsored program [funded by state and federal monies] providing home services to people who would otherwise be eligible for Medicaid nursing facility care. The Department appropriately rejected the claim on the basis that the worker was excluded from coverage due to the domestic servant exception since there was little evidence of supervision or control over the worker's activities. *Citing Jackson v. Harvey*, 72 Wn.App. 507 (1994) *review denied*, 124 Wn.2d 1003 (1994). **....Linda Bromley, 93 3892 (1995)** (dissent)

Insurance agents – See **INDEPENDENT CONTRACTORS**

Jurors

A citizen serving as a juror is not an "employee" nor is the county an "employer" with respect to the juror. Consequently, a juror is not covered under the Act for injuries incurred while so serving. **....Bjorn Viking Bolin, 68,166 (1985)** [*Reversed, Bolin v. Kitsap County*, 114 Wn.2d 70 (1990)] [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 92-2-0695-5.]

Loggers - See **INDEPENDENT CONTRACTORS**

Outside salespeople – See **INDEPENDENT CONTRACTORS**

Partners (RCW 51.12.020(5))

In determining whether limited partners are excluded from mandatory coverage pursuant to RCW 51.12.020(5) the Board considers the intent of the parties, as evidenced by their agreement, their acts and conduct, and all the facts and circumstances of the case. Where there was no sharing of profits and losses, the working relationship between the individuals was in reality that of employer and employees, and the sole purpose of the partnership agreement was to evade the benefits and burdens of the Industrial Insurance Act in contravention of RCW 51.04.060, the limited partners were held to be "workers" subject to mandatory coverage under the Act. **....K E W Construction, 87 0152 (1988)**

[*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 88-2-02759-2.]

Real estate agents – See **INDEPENDENT CONTRACTORS**

Route managers

Where every aspect of the route manager's job is controlled by the employer and the employer supplies the work as well as the equipment, the fact that the route managers hire helpers and do not believe they are employees does not make them independent contractors. A right to control the work performed and an absolute right to terminate the relationship without liability are inconsistent with the concept of an independent contract and establish an employer-employee relationship. **....Rainbow International, 88 2664 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 90-2-00248-6.]

Volunteers

An informant for a police vice squad was a volunteer and not an "employee" since the services rendered were primarily to further his own interests, and he received no remuneration other than expense advances. **....Ronald Meyer, 42,576 (1975)**

EMPLOYER'S FAILURE TO PROVIDE MEDICAL CARE

An employer's alleged negligent failure to provide proper medical care to a worker stricken on the job with a non-industrial heart attack does not convert the heart attack into a compensable industrial injury**. ..Alfred Gronenthal, Dec'd., 44,686 (1976)**

EQUITABLE POWERS

(See BOARD)

ETHICS

Attorney as witness

Where the testimony of the worker's attorney was critical to the questions in dispute, the attorney was precluded, under RPC 3.7, from acting as both witness and advocate. The attorney's testimony was stricken and the matter remanded to the hearing process. **....Kenneth Barber, 87 0334 (1988)**

EVASION OF BURDENS (RCW 51.04.060)

(See COVERAGE AND EXCLUSIONS and PENALTIES)

EVIDENCE

(See also EXPERT TESTIMONY)

Admissibility of expert opinion – See **EXPERT TESTIMONY**

Attorney as witness

Where the testimony of the worker's attorney was critical to the questions in dispute, the attorney was precluded, under RPC 3.7, from acting as both witness and advocate. The attorney's testimony was stricken and the matter remanded to the hearing process. **....Kenneth Barber, 87 0334 (1988)**

Collateral source rule

To be admissible, evidence of receipt of benefits from a collateral source (*e.g.*, employer retirement or social security disability benefits) must be coupled with expert evidence tying the receipt of those benefits to a lack of motivation to return to work or some other relevant issue. **....Adelbert Farr, 88 0699 (1989)** [*Affirmed on other grounds, sub nom, Weyerhaeuser v. Farr*, 70 Wn.App. 759 (1993) Holding on collateral source rule overruled by *Johnson v. Weyerhaeuser*, 134 Wn. 2d 795 (1998)]

Since motivation to work is a factor in the permanent total disability determination, evidence of receipt of social security benefits is relevant and admissible to show the worker's financial motivation not to work. **....Lawrence Musick, 48,173 (1978)** [concurrence and dissent] [*Editor's Note:* Holding on collateral source rule overruled by *Johnson v. Weyerhaeuser*, 134 Wn. 2d 795 (1998)]

Documents

In the event a party timely objects to a document offered under ER 904, the document shall be rejected if it is inadmissible under other rules of evidence. **....Melvin Cork, Jr., 95 1341 (1996)**(dissent)

Effect of failure to allow inspection of records (RCW 51.48.040)

Where an employer failed to provide records to Department on Fifth Amendment grounds, it is precluded from presenting evidence at the Board that the assessment was incorrect. *Citing Annest v. Annest*, 49 Wn.2d 62 (1956). **....Cheri's Pet Grooming, 89 5939 (1991)**

Exhibits containing hearsay

The failure of a party offering a business record to remove objectionable hearsay renders the entire exhibit inadmissible. **....Peter White, 58,734 (1982)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 82-2-05992-7.]

Judicial notice

The Board must rely on the opinions of medical witnesses in the record as the basis for findings addressing mental health diagnoses and may not rely on taking judicial notice of the DSM. **….Rafaela Martinez, 07 25143 (2009)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 09-2-32099-3KNT]

Judicial notice of AMA guides

The Board can take judicial notice of the AMA guides when making a determination regarding permanent partial disability. **....Bertha Ramirez, 03 14933 (2004)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County by Department Cause No.04-2-25966-5SEA, employer Cause No. 04-2-24884-1Sea, Consolidated under Cause No. 04-2-25966-5SEA]

Learned treatise

Although an expert witness could testify about his conclusions based on a NIOSH report, he could not read the text of the report into the record as that would subvert the purposes of the hearsay rule, as well as the learned treatise exception. *Citing* ER 703. **....Nancy Proszek, 92 6049 (1995)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 95-2-0188-8.]

Physician-patient privilege

There is no physician-patient privilege with respect to workers' compensation claims. RCW 51.04.050. **....Adelbert Farr, 88 0699 (1989)** [*Affirmed, Weyerhaeuser v. Farr,* 70 Wn.App. 759 (1993)]

Psychologist-patient privilege

Although the privilege exemption of RCW 51.04.050 applies only to communications made to physicians and not to those made to psychologists, statements made by a worker to a psychologist in the course of treatment under an industrial insurance claim are not privileged, as the worker had no reasonable expectation that such communications would be kept confidential. **....Emmett Smith, 70,253 (1987)** [*Editor's Note*: The Board's decision was appealed to superior court under. The Board's decision was appealed to superior court under Snohomish County Cause No. 87-2-01158-3.]

Rebuttal testimony

WAC 263-12-115(2)(c) does not entitle a party to present rebuttal testimony as a matter of right. The rule only concerns the order in which rebuttal testimony is presented, if allowed. Rebuttal evidence is not simply a reiteration of a party's evidence in chief, but must consist of evidence offered in reply to new matters. A party may not withhold substantial evidence merely to present the evidence cumulatively at the end of the other party's case. The determination of whether to allow or restrict rebuttal is within the discretion of the Industrial Appeals Judge and can only be made following a disclosure of the evidence sought to be presented. **....Maria Chavez, 87 0640 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 88-2-02121-9.]

Statements by interpreter

Statements interpreting statements of the worker made during medical examinations were relied upon by the doctors for the purpose of diagnosis or treatment and are admissible under ER 803(a)(4). If the worker questions the accuracy of the interpretation, the burden is on the worker to present evidence to that effect. Such evidence, however, would only bear on the weight to be given the doctors' opinions, and not on their admissibility. **....Maria Chavez, 87 0640 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 88-2-02121-9.]

EXCLUSIONS FROM COVERAGE

(See COVERAGE AND EXCLUSIONS)

EXEMPTION OF AWARDS (RCW 51.32.040)

(See PENALTIES)

EXPERT TESTIMONY

(See also CAUSAL RELATIONSHIP, EVIDENCE)

Admissibility of opinions

Portions of the testimony of an internist could be excluded to the extent the internist relied on tests not widely used in the medical community to diagnose toxic exposure. **....Laurie Anderson, 93 3571 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 96-2-05615-0.]

Conclusions

An expert witness could testify about his conclusions based on a NIOSH report and be questioned regarding his reliance on the report. *Citing* ER 703. **....Nancy Proszek, 92 6049 (1995)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 95-2-0188-8.]

Physician's Assistant

*Because the Department's medical aid rules permit a physician's assistant to render opinions on causation, a physician's assistant's opinion is a sufficient expert opinion to prove causation of a diagnosed condition. **….Evelyn Woods, 07 23506 (2009)**

Scope of expertise

Psychologist diagnoses of certain mental health conditions not listed in DSM-IV were within the psychologists' scope of practice and were valid diagnoses of the worker's conditions caused by the exposure at work. ….Diana Gegg, 08 16647 (2010)

A physical therapist is not qualified to render opinions of medical causation. **....Juan Muñoz, 05 11698 (2007)** [*Editor's Note: The Board's decision was appealed to superior court under King County Cause No.07-2-38541-0KNT*].

An occupational therapist who is properly qualified as an expert is competent to testify regarding findings and conclusions regarding a worker's physical limitations. **....Peter Kunst, 04 14164 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 06-2-05600-9.]

The Board can rate a permanent partial disability based on findings of a non-physician expert qualified to make disability-related findings when the record also contains medical evidence establishing the existence of a permanent partial disability. **....Bertha Ramirez, 03 14933 (2004)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No.04-2-25966-5 SEA.]

Because a psychologist is not a physician as contemplated by WAC 296-20-210, the psychologist cannot rate permanent partial impairment. **....William Russell, 95 0628 (1996)**(dissent)

An orthopedic surgeon, even though not licensed to practice chiropractic, is qualified to testify regarding a worker's need for continued chiropractic treatment. **....Leon Wheeler, 70,344 (1986)**

Vocational expert testifying by hypothetical

There is no requirement that a vocational expert see or interview a worker before offering an opinion as to the worker's employability. The fact that the expert testimony is based purely on a hypothetical question goes only to its weight and not to its admissibility. **....Lawrence Larsen, 54,979 (1980)**

EXTRATERRITORIAL COVERAGE

(See COVERAGE AND EXCLUSIONS)

EYEGLASSES

(See PROPERTY DAMAGE AS RESULT OF INDUSTRIAL ACCIDENT)

FIXITY OF CONDITION

(See ABATEMENT and PERMANENT TOTAL DISABILITY)

FRAUD

Burden of proof

To establish fraud, the Department or self-insured employer must establish by clear, cogent and convincing evidence that the worker earned income. In cases involving time loss compensation or loss of earning benefits, as opposed to pension benefits, the Department or self-insured employer need only show there was a knowing misrepresentation of the specific amount of income from wages or profit from self-employment on which it relied. In each case, however, the Department or self-insured employer must show the recipient's statement supporting payment of benefits was false in some material way. *Citing In re Norman Pixler*, BIIA Dec., 88 1201 (1989). **....Del Sorenson, 89 2697 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-01355-6.]

Discovery (RCW 51.32.240(4))

Where fraud is alleged in a matter where loss of earning power benefits are paid, the level of information sufficient to trigger an investigation, and thereby establish the date of discovery, would have to be more specific and detailed than a telephone report that worker was employed. **....Sherryl Schank, 90 1542 (1991)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 92-2-04865-3.]

The Department must demand repayment of benefits fraudulently obtained within "one year of discovery of the fraud." That phrase refers to the date the Department has sufficient facts in hand to commence an investigation. Receipt by the Department of cancelled "payroll" checks evidencing employment by the worker constituted the date of discovery of fraud in this particular case. **....Robert Carder, 69,461 (1988)**

Effect of worker's failure to present evidence when due

In a fraud case, the Department has the initial burden of producing all evidence to establish the correctness of its order. A proposed decision and order dismissing the appeal for failure to present evidence when due on the basis of worker's failure to appear at hearing is not within the authority of RCW 51.52.050 or RCW 51.52.102. **....Ralph Jackson, 90 1095 (1991)** [*Editor's Note*: Department also has burden under "willful misrepresentation."]

Material misrepresentation

If a worker's earnings from employment performed while receiving a permanent total disability pension are not sufficient to warrant either recoupment or termination of pension benefits, then the worker's misrepresentation regarding the employment is not "material" -- one of the nine essential elements of proof of fraud -- and the Department is not entitled to recoup benefits pursuant to the fraud provisions of RCW 51.32.240. **....Norman Pixler, 88 1201 (1989)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 89-2-04666-5.]

Time period of fraudulent activity

The fact that the Department proves fraud during specific time periods does not relieve the Department of the responsibility to prove fraud for the entire period in which recoupment of benefits is sought. **....Albert McKee, 94 2077 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Grays Harbor County Cause No. 96-2-00188-7]

HEARING LOSS

(See OCCUPATIONAL DISEASE)

HEART ATTACK

(See also EMPLOYER'S FAILURE TO PROVIDE MEDICAL CARE, INJURY and SUBSEQUENT CONDITIONS TRACEABLE TO ORIGINAL INJURY)

Emotional stress

The principles of *Sutherland* (4 Wn. App. 333) apply to a claim for a heart attack precipitated by unusual emotional stress whether the stress is caused by an external, tangible and objective event which has taken place or one which is about to take place. **....James Hammond, 67,968 (1986)**

Presumption in RCW 51.32.185

If the facts support a finding that the presumption in RCW 51.32.185 applies, findings and conclusions regarding the presumption are required. **….Steve Goforth, 09 16328 (2010)**

A firefighter must initially offer evidence that the condition is one contemplated by the statute. Only after doing so is the burden shifted to the Department or the self-insured employer to rebut the presumption by a preponderance of the evidence. **….Edward Gorre, 09 13340 (2010)**
[Editor's Note: The Board's decision was appealed to superior court under Pierce County Cause No. 11-2-05064-1.]

Unusual exertion

The duties of a job at a cement plant were not routine for a worker who, immediately prior to the injury, had been retired for six to seven years in a sedentary lifestyle. The physical exertion of the job was "unusual" even though the worker had been employed in the same job prior to retirement. **....Harley Buchner, Dec'd., 59,239 (1982)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Whatcom County Cause No. 82-2-00922-5.]

INDEPENDENT CONTRACTORS

(See also COVERAGE AND EXCLUSIONS and EMPLOYER-EMPLOYEE)

Entertainers

A performance lease that required a dancer to pay a certain amount to a club that required performance during specified shifts to create revenue for the club was a contract, the essence of which was clearly personal labor. The dancer was a covered worker when performing under the contract. **....Beth Stracener, 05 14952 (2006)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 06-2-11854-1.]

Home health care attendant

Where home health care attendants assist a totally incapacitated individual, personal labor is the essence of the independent contract, and the home health care attendant is a worker within the meaning of RCW 51.08.180(1). *Citing Massachusetts Mutual Life v. Department of Labor & Indus*., 51 Wn. App. 159 (1988). Home health care attendants' service represented personal labor, even though based on skill and expertise, since personal labor is not restricted to manual labor. **....Mary Bliss Maxwell, 90 0855 (1991)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 91-2-18181-1.]

Insurance agents

Where insurance sales agents working under independent contracts with a general agent can and do employ others to perform at least part of their contracts to sell insurance, their personal labor is not the essence of their independent contracts and they are not "workers" within the meaning of RCW 51.08.180. *Citing Massachusetts Life Insurance Co. v. Department of Labor & Indus.*, 51 Wn. App. 159 (1988). [*Overruling In re Family Life Insurance Company*, BIIA Dec., 63,147 (1984)] **.....James D. Shanley & Wife, dba, Northwestern Mutual Life Insurance Company, 87 0485 (1988)**

The statutory provisions which include as "workers" independent contractors whose personal labor is the essence of the contract were not designed to embrace only "spurious" independent contractors. (RCW 51.08.070, RCW 51.08.180). **....Family Life Insurance Company, 63,147 (1984)** [dissent] [*Overruled, In re James D. Shanley & Wife, dba, Northwestern Mutual Life Insurance Company*, 87 0485 (1988)]

Loggers

In light of contracts which did not specifically permit contract cutters to delegate responsibilities to others and which appeared to preclude delegation without authorization, inquiry into whether cutters actually hired others is necessary in order to determine whether essence of the contract was personal labor. When cutter did not hire others, the essence of that contract was personal labor and he was a "worker" under the Act. **....Wayne Jamison et ux Wayne Jamison Timberfallers, 87 1383 (1988)**

Outside salespeople

Where outside salespeople working under independent contracts with a manufacturer's representative are not required to provide any special equipment or employ others to perform the work contemplated by their contracts, and do not, in fact, delegate their duties to others, the essence of their contracts is their personal labor. Under the negative three-pronged test set forth in *White v. Department of Labor & Indus.*, 48 Wn.2d 470 (1956) they are "workers" within the meaning of RCW 51.08.180. **....Traditions Unlimited, Inc., 87 0600 (1989)**

Real estate agents

Where real estate agents working under independent contracts with a real estate company do not supply any special equipment necessary to perform the job, and it is not their duties to others, the essence of their contracts is their personal labor. The fact that agents occasionally contract with third parties to perform some services necessary to facilitate a sale does not constitute a delegation of their duties under their contracts. Under the negative three-pronged test set forth in *White v. Department of Labor & Indus*, 48 Wn.2d 470 (1956) they are "workers" within the meaning of RCW 51.08.180. **....Peter M. Black Real Estate Co., Inc., 88 1191 (1989)** [*Affirmed, Black Real Estate v. Labor & Indus.*, 70 Wn. App. 482 (1993)]

Sole proprietors

The requirement that an independent contractor have an account with state agencies as required for the payment of taxes provided in RCW 51.08.195(5), does not necessarily encompass contractor registration with the Department of Labor and Industries because a contractor must register with the Department and establish an account only if the contractor has employees. **....Mauricio Torres d/b/a MT Carpets, 04 21119 (2006)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 06-2-25404-0SEA.]

Whether an independent contractor is exempt from coverage under the sole proprietor exclusion of RCW 51.12.020(5) depends upon factors such as whether the person (1) has a principal place of business eligible for a business deduction for IRS purposes, (2) maintains a separate set of books or records reflecting income and expenses, (3) has done everything legally necessary to establish a business in the state of Washington, (4) has obtained necessary licenses and tax identification numbers, (5) provides services to more than one person or entity, and (6) holds him or herself out to the general public as an independent business person. An additional consideration is "which way does the money flow?" **....Fiedler Industries, 89 0822 (1990)** [*Editor's note*: See later statutory amendments, Laws of 1991, ch. 246, § 1 (effective January 1, 1992)]

INJURY (RCW 51.08.100)

(See also HEART ATTACK, EMPLOYER'S FAILURE TO PROVIDE MEDICAL CARE, OCCUPATIONAL DISEASE, SCOPE OF REVIEW and SUBSEQUENT CONDITION TRACEABLE TO ORIGINAL INJURY)

Burden of Proof

When considering allowance of a claim for industrial injury the focus is on whether a qualifying event occurred. The fact that preexisting infirmities were also a cause of the injury does not defeat a claim for benefits. **….Soledad Pineda, 08 19297 (2010)** [Editor's Note: The Board's decision was appealed to superior court under Benton County Cause No. 11-2-00024-6.]

A worker failed to meet the burden of proof for establishing an industrial injury where all, except two, of the witnesses testifying about the injury had a direct financial interest in the outcome of the appeal or were friends and relatives of one of the parties. The two disinterested witnesses, although inconclusive about whether the job had concluded before the injury, raised a question about the worker's version of the incident. **....George Trangmar, 93 3287 (1994)**

Idiopathic fall

An injury sustained in a fall which was caused by conditions personal to the worker (i.e., a seizure resulting from alcohol withdrawal) is compensable under the Act, as there is no statutory requirement that the injury "arise out of employment." **....Marion Lindblom, Dec'd., 45,619 (1976)** [dissent]

Normal bodily movement

An attorney, who broke loose a dental crown when he bit into a piece of candy taken from a dish located on the reception desk of his employer, sustained an industrial injury. The issue in such a case was not whether the eating activity was in response to a requirement of the job, but rather, whether the eating activity was permissible and reasonably incidental to the duties of the job. *Overruling In re Carol Rivkin*, BIIA Dec., 85 1694 (1986) **....Philip Carstens, Jr., 89 0723 (1990)** [special concurrence]

A normal bodily movement must be in response to the requirements of the job for any resulting injury to be compensable. Therefore, a secretary who breaks a tooth while eating popcorn on the job has not sustained an "injury" under RCW 51.08.100. **....Carol Rivkin, 85 1694 (1986) [***Overruled, In re Philip Carstens, Jr.,* BIIA Dec., 89 0723 (1990)]

"Physical conditions"

Where the worker has shown through competent expert testimony that he developed a mental condition as a result of a sudden emotional stress during the course of employment, he has presented sufficient proof that he has suffered an industrial injury. The worker need not show that the stress was "unusual," or that it "arose out of" employment. **....Robert Hedblum, 88 2237 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 89-2-02751-5.]

The deflation of a breast implant caused by a blow in the course of employment constitutes an industrial injury and the worker is entitled to an implant replacement to permit her to regain her pre-injury appearance. **....Patsy Schmitz, 68,429 (1986)** [dissent]

In addition to a tangible happening, there must be a resulting physical condition or bodily harm before an industrial accident can constitute an "injury," and the causal relationship between the physical condition and the accident must be established by medical testimony. **....Kenneth Heimbecker, 41,998 (1975)**

Physical/mental conditions

Worker suffered a non-toxic exposure to fertilizer that caused her to believe she was injured, resulting in a conversion disorder, and mixed personality disorder. This belief that a condition resulted from the incident is sufficient to sustain a claim. **...Amada Pacheco, 03 11030 (2004)**

Proximate cause: new injury v. aggravation – See **AGGRAVATION**

Psychiatric conditions (mental/mental) – see also "Sudden and tangible happening"

Where a worker returned to a worksite where a hydrochloric acid spill had occurred, experienced a bad taste in her mouth, smelled a particular odor, and developed itchy skin and breathing difficulties, the events following the worker's entry into the workplace sufficed as "occurring from without" as required by RCW 56.08.100. **....Adeline Thompson, 90 4743 (1992)** (dissent) [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 92-2-17307-7.]

Where the worker has shown through competent expert testimony that he developed a mental condition as a result of a sudden emotional stress during the course of employment, he has presented sufficient proof that he has suffered an industrial injury. The worker need not show that the stress was "unusual," or that it "arose out of" employment. **....Robert Hedblum, 88 2237 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 89-2-02751-5.]

"Sudden and tangible happening"

An event is a sudden and tangible happening of a traumatic nature when it is something of notoriety, fixed as to time and susceptible of investigation. In this decision *In re Adeline Thompson*, BIIA Dec., 90 4743 (1992) is designated as "significant." **....Virginia Key, 94 4700 (1996)** (dissent) [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 97-2-24869-9KNT.]

A worker's mental reaction to failed job performances and related disciplinary actions over a period of time leading ultimately to dismissal do not establish the "suddenness" or "traumatic" requirements of proof of an industrial injury. **....Daniel Ramos, 91 6906 (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 93-2-01054-4.]

Two hours of hand-carrying boxes and removing office belongings, resulting in the aggravation of a preexisting shoulder strain, meets the definition of an industrial injury. **....Renford Gallier, 89 3109 (1990)**

Three weeks of harassment by a co-worker, producing a mental condition, constitutes an industrial injury. The emotional trauma was fixed as to time, a matter of notoriety, and susceptible to investigation. **....David Erickson, Dec'd., 65,990 (1985)**

Emotional trauma at work over a period of five hours, which lights up latent, asymptomatic and non-disabling multiple sclerosis, constitutes an injury. [RCW 51.08.100]. **....Laura Cooper, 54,585 (1981)**

A mile hike by a land surveyor, producing a hyperventilation syndrome and an anxiety reaction, constitutes a "sudden and tangible happening." There is no legal requirement that tangible happenings be instantaneous or confined to a period measured in a certain number of seconds or even minutes. **....James Jacobs, 48,634 (1977)**

Toxic Encephalopathy

A worker presented no objective evidence of exposure to carbon monoxide or insufficient oxygen during a specific flight when she felt hungry and disoriented and after which the worker felt mentally slow, easily frustrated, and afflicted with memory problems. As a result, although the medical witness diagnosed hypoxic encephalopathy due to oxygen deprivation or toxic encephalopathy due to carbon monoxide exposure during specific flights, the Department appropriately rejected the claim for industrial injury. **....Nancy Proszek**, **92 6049 (1995**) [*Editor's note: Intalco Aluminum v. Department of Labor & Indus*., 66 Wn.App. 644 (1992) distinguished because there the facts demonstrated multiple possible causes of neurological damage actually present in the workplace. The worker offered no objective evidence of a damaging incident or damaging exposure. The Board's decision was appealed to superior court under King County Cause No. 95-2-0188-8.]

"Traumatic nature"

A worker's aspiration of a piece of steak during a business lunch is a "sudden and tangible happening, of a traumatic nature...occurring from without," and meets the statutory definition of an injury. No showing of external physical violence is necessary for an incident to qualify as "traumatic." **....Donald Cawley, Dec'd., 41,864 (1974)** [dissent]

Unusual exertion not required

The aggravation of preexisting lung blebs (weakened spots) ruptured by routine on-the-job exertion is compensable as an "injury." It is not necessary to show unusual exertion as in cases of cardiovascular incidents. **....Gary Sundberg, 62,107 (1983)** [dissent]

INTEREST (RCW 51.52.135)

Attorney fees not allowed on interest award

It is unlawful to charge an attorney fee from interest awarded pursuant to RCW 51.52.135. **....Floyd Allen, 69,533 (1988)** [*Editor's Note*: The Board's decision was appealed to superior court under Skagit County Cause No. 88-2-00124-6.]

Fixing interest following superior court appeal

Where the worker prevails in an appeal to superior court the Board no longer retains jurisdiction for the purpose of fixing interest in that appeal, unless specifically directed to do so by order or judgment of the court. RCW 51.52.135(3). **....Charles Leo Courneya, 89 0845 (1989)**

Loss of earning power benefits

Interest is not payable when a worker is awarded loss of earning power benefits since such benefits are not payments for temporary total disability and RCW 51.52.135(2) permits payment of interest when a worker prevails in an appeal regarding a claim for temporary total disability. **....Manuel Estrada, 89 3707 (1991)**

Waiver impermissible

The Board will not approve an agreement which provides that the worker waives the claim for interest or that attempts to define the amount of interest to be paid. Such agreements are not in conformity with the law. RCW 51.04.060. **….Walter Brown, 96 4666 (1999)**

INTERPRETERS

Qualification (RCW 2.43.040)

When inquiring as to an interpreter's qualifications the interpreter should be specifically asked whether (s)he is certified by the Office of the Administrator for the Courts in the state of Washington. The industrial appeals judge should be specific in satisfying the requirements of RCW 2.43.040. **....Hipolito Cruz, 94 7234 (1996)** [*Editor's Note:* The decision and order incorrectly refers to RCW 2.42.040]

Requirement to provide at deposition

The self-insured employer is not required to pay for interpretive services at a deposition; the cost of providing an interpreter is to be borne by the non-English speaking person unless that person is shown to be indigent. **….Maria Gonzalez, 97 0261 (1998)**

Requirement to provide at medical examination

The Department cannot enforce a policy of requiring the self-insured employer to pay for an interpreter for the workers' benefit during medical consultation unless there is a rule to that effect. Because no such rule exists, the Department was incorrect in requiring the self-insured employer to pay for the services of an interpreter.
….Maria Gonzalez, 97 0261 (1998)

INTERVENTION

Medical providers

A hospital which has provided medical services for which the Department has denied payment has an interest in an appeal concerning the worker's entitlement to such services and may properly intervene. **....Richard Thrush, 30,899 (1969)**

JOINDER

Department as necessary party

The Department must be included as a party to an appeal where the outcome of the appeal may have a direct impact on the second injury fund.
….Shelby McCallum, 00 17408 (2001)

The Department is a necessary party to an appeal in light of WAC 296-14-420(1) where the issues on appeal involve whether a new injury or aggravation occurred and there are simultaneous applications filed under two different claim. **....Craig Fruth, 91 4490 (1992)**

Multiple claims and employers

An employer, other than the one for which the worker was working at the time of the alleged injury, is not an aggrieved party within the meaning of RCW 51.52.060, but because there is an issue related to identification of the responsible employer, the matter should be remanded to the Department pursuant to WAC 296-14-420 for consideration of the employer to be charged. **....Kenneth Keierleber, 91 5087 (1993)**

Where a dispute arises as to whether the condition for which the worker requires medical treatment is due to one of two separate injuries with two separate employers, it is proper to join the non-appealing employer as a party**. ....Mario Miranda, 40,116 (1972)**

Provider as necessary party

Where the ultimate resolution of an appeal impacts the self-insured employer's responsibility to pay the provider for services and when the provider moved to intervene after issuance of a proposed decision and order after the matter was tried without notice to the provider, the Board joined the provider as a necessary party and remanded the matter for further proceedings to consider the provider's assertions.
....William Shumate, 91 4962 (1992)

Single claim, multiple possible employers/insurers

Although all potential insurers on a claim must be given the opportunity to participate in an appeal involving claim allowance, if all the potential employers are insured through the state fund and the Department is participating in the appeal, it is unnecessary to join all state fund employers. **....Daniel Pingley, 01 16177 (2003)** [*Editor's Note*: The Board's decision was appealed to superior court under Cowlitz County Cause No. 03-2-00215-2.]

A claim cannot be rejected because the responsible employer or insurer is not a party to the appeal. To fully decide the issue of claim allowance, any potentially responsible insurer must be allowed to participate. If the state fund is implicated, the Department must be joined. It is unnecessary to join all state fund employers, although they may be allowed to participate. **….Richard Eades, 01 17639 (2002)**

JURISDICTION

(See BOARD, DEPARTMENT, NOTICE OF APPEAL, PROTEST AND REQUEST FOR RECONSIDERATION, SCOPE OF REVIEW, STANDARD OF REVIEW, TIMELINESS OF CLAIM and TIMELINESS OF APPLICATION TO REOPEN CLAIM)

LIGHT DUTY

(See TIME LOSS COMPENSATION)

LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT

(See COVERAGE AND EXCLUSIONS)

LOSS OF EARNING POWER (RCW 51.32.090(3))

(See also TIME LOSS COMPENSATION)

Comparison wages after reopening

After a reopening of the claim, a worker's loss of earning power benefit shall be based on a comparison of the worker's earning power at the time of the initial injury with his current earning power, following the rationale of *Hubbard v. Department of Labor and Indus.*, 92 Wn. App. 941 (1998), *rev'd. on other grounds,* 140 Wn.2d 35 (2000), rather than that of *Davis v. Bendix Corp.*, 82 Wn. App. 267 (1996), *rev. denied,* 130 Wn.2d 1004 (1996). **....Jack Hamilton, 03 14743 (2004)**

Department obligated to make eligibility determination

Where the worker's condition is not fixed and the worker can return to light duty employment but not to her former job, the Department is required to determine whether the worker is eligible for loss of earning power compensation.
....Marietta Arnold, 56,329 (1981) [concurrence]

Effect of completing vocational rehabilitation

A worker who, upon successfully completing a vocational rehabilitation program approved by the Department, becomes employed at a job with wages 5 percent or more less than that at the time of the injury, is entitled to LEP benefits. The entitlement is not impacted by the Department's later position that the plan was unnecessary.
....Ronald Thomas, 89 3503 (1991)

Effect of not seeking full-time employment

It was incorrect to deny the worker loss of earning power benefits for any period of time on the basis he was not seeking full-time employment due to his enrollment in school, whether a worker actually seeks full-time employment is irrelevant to determining entitlement to loss of earning power benefits. **....Ralph Faulder, Jr., 94 2765 (1996)** (dissent)

Effect of not working

When a worker is not working, but demonstrates a requisite loss of earning power, the worker may be entitled to loss of earning power benefits. Benefits may not be denied merely because the worker was not working for periods of time in which he seeks the benefit. **....Karl Bean, 04 19814 (2006)**

Effect of wage increase in pre- and post-injury employments

A worker's time loss compensation and loss of earning power payments are based on the worker's actual wages at the time of the injury rather than the worker's "potential" ability to earn money. However, in computing loss of earning power benefits it is proper to consider the extent of increase, if any, which has occurred in the earnings paid for the employment held at the time of the injury in order to arrive at the earnings which the worker would have received had he or she not experienced the injury. *(Hunter v. Department of Labor & Indus.*, 43 Wn.2d 696 (1953)). Similarly, it is proper for the Department to take into account any increases in wages from post-injury employment, since, as the worker's wages increase, he regains that portion of his lost earning power.
....Chester Brown, 88 1326 (1989)

Entitlement after reopening

In order to be entitled to loss of earning power benefits after a claim has been reopened, it is necessary to establish that the aggravation caused a temporary total loss of wages or an actual loss of earning power. **....John Parker, 03 23407 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under Skagit County Cause No. 05-2-00443-9.]

Entitlement beyond date condition becomes fixed

A worker's right to temporary periodic disability [loss of earning power (LEP)] benefits, when otherwise due, cannot be terminated by an order formally stating that a condition is fixed when the order does not concurrently determine whether permanent disability benefits are payable under the claim. *Citing Weston, Deering*. The distinction between factual and legal fixity does not justify the result. The worker is entitled to continued LEP benefits until an order fixes the extent of, and makes an award for, permanent partial disability, if any. **....Carl Coolidge, 89 4308 (1991)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Klickitat County Cause No. 91-2-00090-1.]

A worker's condition is not legally fixed until the Department first issues an order which classifies the worker's condition as fixed and permanent. Loss of earning power payments may be made through that date, provided the worker is otherwise entitled to such benefits. However, a protest of the initial closing order does not automatically extend the period of loss of earning power, absent medical evidence establishing that the worker's condition was not fixed on the date of that closing order.
....Douglas Weston, 86 1645 (1987)

A worker receiving loss of earning power compensation, whose condition becomes fixed but whose earning power is not fully restored, is entitled to continuation of loss of earning power compensation until an order is entered fixing the extent of permanent partial disability (*Citing* Hunter (43 Wn.2d 696)). **....Charles Deering, 25,904 (1968)**

Proof required

To prove entitlement to loss of earning power benefits the worker must present (1) lay or expert testimony establishing pre-injury earning capacity; (2) expert testimony establishing post-injury earning capacity; and (3) expert testimony establishing that a reduction, if any, in post-injury earning capacity is causally related to the residuals of the industrial injury. Evidence that a worker's post-injury income was less then pre-injury income is insufficient to establish a loss of earning power absent proof that the worker's reduced income is due to physical restrictions imposed by the industrial injury.
....Patricia Heitt, 87 1100 (1989)

Rebuttable presumption of entitlement

Where the medical evidence establishes that as a result of the injury the worker cannot return to his regular job and is required to change jobs, the fact that his post-injury earnings are less than his pre-injury earnings creates a rebuttable presumption that he has sustained a loss of earning power. **....Howard Dyer, 15,763 (1962)**

Res judicata – See **RES JUDICATA** Time loss compensation

Simultaneous loss of earning power and time-loss compensation

A worker who suffers an industrial injury causing a loss of earning power and subsequently suffers another industrial injury causing temporary total disability is not precluded from simultaneously receiving loss of earning power compensation and time loss compensation. **....Lloyd Larson, 86 0479 (1988)**

Unemployment compensation

Entitlement to loss of earning power benefits does not depend on whether the worker is employed, but rather on whether the worker's capacity to earn the wage at injury is restored. Accordingly, a worker is not precluded from receiving loss of earning power benefits because of the simultaneous receipt of unemployment compensation. **….Daniel Estes, 96 0722 (1997)** [*Editor's Note:* The Board's decision was appealed to superior court under Clallam County Cause No. 97-2-01050-3.]

Wages (RCW 51.08.178) – See **TIME LOSS COMPENSATION**

MARITIME CLAIMS

(See COVERAGE AND EXCLUSIONS)

MEDICAL BILLS

Discretion of Department – See **STANDARD OF REVIEW** Medical Bills

Recovery of overpayment – See **DEPARTMENT** Authority to recoup overpayment of benefits

MISCELLANEOUS SERVICES AND APPLIANCES - WAC 296-23-165

Adjustable bed

WAC 296-23-165 contemplates items and services that are rehabilitative in that they increase function and mobility. An adjustable bed may not be medically necessary if it does not increase mobility or allow the worker to regain function. **….Murney Conley, Sr., 08 17796 (2009)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 09-2-01991-3]

Power chair lift

WAC 296-23-165 contemplates items and services that are rehabilitative in that they increase function and mobility. A power lift chair can be considered medically necessary for treatment if it helps the worker overcome restrictions on mobility and functionality caused by the industrial injury. **….Murney Conley, Sr., 08 17796 (2009)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 09-2-01991-3]

MINISTERIAL ORDERS

(See AGGRAVATION and APPEALABLE ORDERS)

MOTION TO DISMISS

(See also BURDEN OF PROOF)

Failure to make a prima facie case

A party making a motion to dismiss for failure to make a *prima facie* case is not required to rest before the motion can be considered on its merits and does not waive the right to present evidence in the event the motion is denied. **....David Gerlach, 85 2156 (1986)**

NOTICE OF APPEAL (RCW 51.52.050, RCW 51.52.060)

(See also COMMUNICATION OF DEPARTMENT ORDER, PROTEST AND REQUEST FOR RECONSIDERATION and STATUTES)

Aggrieved party

The Board lacks jurisdiction to hear an appeal from an advisory opinion issued by the Department of Labor and Industries. A party is not aggrieved by a Department determination unless the party has a proprietary, pecuniary, or personal right substantially affected by the Department action. **….Chambers Bay Golf Course, 09 20604 (2010)**

An employer, other than the one for which the worker was working at the time of the alleged injury, is not an aggrieved party within the meaning of RCW 51.52.060. **....Kenneth Keierleber, 91 5087 (1993)**

Assignee as person affected or aggrieved

An assignee of a self-insured employer is not a "person affected" or "other person aggrieved" within the meaning of RCW 51.52.050 unless the Department is clearly put on notice of the assignee's interest in the subject matter of the order before the order's issuance. **....Calvin Keller, Dec'd., 89 4546 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-01677-6.]

Contents required

To be recognized as a notice of appeal, the written document itself must indicate an intent to appeal and must identify the Department decision or order being challenged. An appeal of an order under one claim cannot be treated as an appeal of an order under another claim, even though the worker testifies that she intended to appeal both orders. **....Lynnette Murray (I), 41,887 (1974)**

Protest and notice of appeal

A notice of appeal filed only with the Department cannot be treated as a protest and request for reconsideration. The Department's subsequent adherence order is therefore a nullity which does not divest the Board of jurisdiction over the appeal from the original order. **....Thomas Houlihan, 67,414 (1985)**

When a firm filed an appeal from an "appealable only" order from which it had already filed with the Department a letter requesting reconsideration within prescribed time limits and the Department had not transmitted the protest to the Board and did not reassume jurisdiction in the later appeal, the Board considered the Department's action an indication of its intent to treat the protest as a notice of appeal. (*Citing In re Donzella Gammon*, BIIA Dec., 70,041 (1985)). **....Tony Mandrell, 92 2819 (1993)**

When the worker files a "protest" with the Department within 60 days of communication of the order despite the fact the formal protest language on the order has been crossed out, and the Department does not transmit the "protest" to the Board until after the appeal

period has elapsed, the "protest" should be treated as a timely appeal. **....Donzella Gammon, 70,041 (1985)**

Timeliness

Where the notice of appeal filed with the Board was untimely, but the worker had timely filed the same appeal with the Department, the appeal was timely and the Board considered the merits of the appeal. **....George Trangmar, 93 3287 (1994)**

If an appeal is not timely, the Board must dismiss the appeal rather than affirm the appealed order. **....Leroy Hauser, 94 4636 (1995)**

Where a notice of appeal was delivered to a private express delivery company on the 30th day and the Board received it on the 31st day, the appeal was not timely since delivery to the private delivery agent was not the same as delivery to the U.S. Mail as set forth in RCW 51.48.131. **....Continental Sports Corp., 90 2027 (1991)** [*Reversed, Continental Sports Corp. v. Department of Labor & Indus*., 128 Wn.2d 594 (1996)]

Where the last day for filing an appeal falls on a Sunday, that day is excluded from the computation of the 60 day appeal period. A party has until the next succeeding business day to file the notice of appeal. **....Robert Chandler, 69,784 (1986)**

A notice of appeal from a Department order is effectively filed when it is properly posted in the mail on or before the sixtieth day from the date the Department order was communicated to the party. **....Harold Francis, 68,154 (1985)**

OCCUPATIONAL DISEASE (RCW 51.08.140)

(See also AGGRAVATION, COURSE OF EMPLOYMENT, SCOPE OF REVIEW and TIMELINESS OF CLAIM)

Aggravation of preexisting condition

Aggravation of a pre-existing condition by distinctive conditions of work can be the basis for an occupational disease claim allowance without a showing that the pre-existing condition has objectively worsened. **....Donald Plemmons, 04 12018 (2005)**

Aggravation of preexisting occupational disease vs. new occupational disease – See **AGGRAVATION** Proximate cause of worsened condition: new occupational disease vs. aggravation

Apportionment

The allocation of responsibility permitted by WAC 296-17-870 may be addressed in an employer's appeal by establishing that the worker was engaged in employments not considered by the Department and that these employments contained the hazard or exposure that contributed to the disease. **….Michael Smith, 00 12127 (2002)**

Concurrent employers

Responsibility for an occupational disease can be apportioned between insurers when the worker was employed in concurrent employment covered by different insurers and each employment was a proximate cause of the occupational disease. **....Amy Dunnell, 03 18764 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 05-2-02014-2.]

Date of manifestation – see Schedule of benefits appealable

Hearing loss

A medical expert can segregate alternate causes of hearing loss so long as the segregation is based on the worker's specific circumstances and generally accepted understanding of the nature of hearing loss. **….Dietrich Hardy, 08 12990 (2009)**

A claim for hearing loss can be allowed without a showing of compensable loss so long as occupational exposure to harmful levels of noise caused a loss of hearing. **....Art McDaniel, 03 10546 (2004)**

Although clinically reliable audiograms may present the best measure in determining the extent of hearing loss, industrial audiograms will not be discounted, per se. All relevant evidence is examined to determine the reliability of any audiogram. The industrial audiograms that demonstrated a gradual and consistent increase in loss of hearing and were performed close in time to the end of the worker's exposure to workplace noise were reliable. **….Clarence Shellum, 99 12154 (2000)** [dissent]

Present methods of differentiating between age-related hearing loss (presbycusis) and noise-related hearing loss are not sufficiently reliable to allow an award for permanent hearing loss to be reduced for presence of presbycusis. **....Eugene Williams, 95 3780 (1998)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 98-2-00806-4, Department; Lewis County Cause No. 98-2-00422-1, Employer.] [*Affirmed, in part, overruled in part, Boeing v. Heidy*, 147 Wn.2d 78 (2002), *See also, In re Larry Wass*, BIIA Dec., 01 11201(2002)]

Last injurious exposure – see Successive insurers - See also **COVERAGE & EXCLUSION**

Responsibility for an occupational disease can be apportioned between insurers when the worker was employed in concurrent employment covered by different insurers and each employment was a proximate cause of the occupational disease. **....Amy Dunnell, 03 18764 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 05-2-02014-2.]

Longshore and Harbor Workers' Compensation Act

A claim should not be rejected on the basis the condition developed while the worker was self-employed and not covered by the industrial insurance laws as the last injurious exposure rule was not intended to apply as a basis to deny a claim. The Department is required to determine the nature and extend of the worker's covered employment to determine whether any of such employment impacted the worker's condition. (*Citing In re John Robinson*, BIIA Dec., 91 0741 (1992) (federal) and *In re Gary Peck*, Dckt No. 91 6243 (January 19, 1993) (another state). **....Louis Williams, 92 4110 (1993)**

Onset of condition

Even though the likeliest source of a worker's exposure to hepatitis C was "needle sticks" during employment as a dental assistant and the worker could have filed an injury claim based on the needle sticks, the condition did not develop to the extent that it was disabling or required treatment until 1992. For that reason, the claim should be considered as a request for benefits for an occupational disease as defined by RCW 51.08.140. **....Sharon Baxter, 92 5897 (1994)**

Proximate cause: occupational disease v. aggravation – See **AGGRAVATION**

Psychiatric conditions (mental/mental)

On-the-job stress related to failed job performances and related disciplinary actions which results in a mental condition is not an occupational disease. RCW 51.08.142; WAC 296-14-300(2) **....Daniel Ramos, 91 6906 (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 93-2-01054-4.]

For a worker to establish an occupational disease claim based on mental stress (1) the stress must be objectively corroborated, not just a product of the worker's own subjective perceptions; (2) the stress must be a requirement or condition of the worker's employment, not just a condition occurring coincidentally at work; (3) the stress must arise out of and in the course of employment; (4) the stress must be different from the stress attendant to normal everyday life and all employments in general, i.e., the stress must be unusual; and (5) the stress must be a cause of the worker's psychiatric condition in the sense that, but for the workplace stress, the worker would not be suffering from the psychiatric condition or disability. [Post-*Dennis*; pre-WAC 296-14-300]
....Ann Woolnough, 85 2816 (1990)

A worker's acute reaction to job stress, even though greater than might be expected for most individuals, constitutes an occupational disease where the increased stress and tension present in the working climate were objectively verifiable and greater than the day-to-day mental stress common to all occupations and to non-employment life. [Post-*Kinville* (35 Wn. App. 80)] **....Bill Murray (II), 57,009 (1984)** [special concurrence and dissent]

A mental condition induced by cumulative stress, the origin and reality of which is solely within the subjective perception of the worker, is not compensable as an occupational disease. [Pre-*Kinville* (35 Wn. App. 80)] **....Gloria Strothers, 58,772 (1982)** [special concurrence and dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 82-2-11969-5.]

The response of the average person to a mental stress or physical demand is not the proper test for determining the existence of an occupational disease. An "acute situational reaction" resulting from the particular worker's real and perceived job stress constitutes an occupational disease. [Pre-*Kinville* (35 Wn. App. 80)]
....Bill Murray (I), 57,009 (1981) [dissent]**.**

A mental illness caused by work-induced mental stimuli qualifies as an occupational disease since it arose naturally and proximately out of employment, there was no intervening or independent cause, and the worker would not have suffered the illness but for the conditions of employment. [Pre-*Kinville* (35 Wn. App. 80)]
....Lyndall Brolli, 49,051 (1977) [dissent]

A worker's mental breakdown due to stress, anxiety and fearfulness arising out of a temporary job as a store manager qualifies as an occupational disease where the conditions leading to the breakdown were objectively manifested, and were not of a kind to which persons in all employments and all activities are exposed. [Pre-*Kinville* (35 Wn. App. 80)] **....David Simmonds, 45,038 (1976)** [dissent]

Reaction to treatment for probable occupational disease – See **COURSE OF EMPLOYMENT**

Schedule of benefits applicable

The date of manifestation for binaural hearing loss is the date the binaural hearing loss became partially disabling, not the date a unilateral loss component of the binaural loss became partially disabling. **....Ronald Lovell, 03 16736 (2005)**

In successive claims involving hearing loss, the second claim involves the same type of disease but a different disease process, arising wholly independent of the first disease. A date of manifestation different from the date used in the first claim can be established. Reversing *In re Scott Pollard*, Dckt. No. 99 20741 (August 1, 2001).
....Paul Brooks, 02 17331 (2003) [*Accord, Pollard v. Weyerhaeuser Co*., 123 Wn.App. 506 (2004)]

Department orders referring only to a "date of injury" do not clearly establish the "date of manifestation" of an occupational disease and are not considered as res judicata with respect to the date of manifestation. **....Rick Yost, Sr., 01 24199 (2003)**

Because the worker's knowledge of his or her disabling condition does not affect the rate of compensation, *In re Eugene Willams*, BIIA Dec., 95 3780 (1997) is overruled to the extent it held that worker's knowledge of the disability is a factor in determining the date of manifestation. *Citing Boeing v. Heidy,* 147 Wn.2d 78 (2002).
….Larry Wass, 01 11201 (2002) [*Editor's Note*: The Board's decision was appeals to superior court under Chelan County Cause No. 02-2-00881-4]

For claims filed after 1988, the schedule of benefits for an occupational disease is established as of the date the disease requires medical treatment or becomes totally or

partially disabling. An individual's hearing loss is deemed to require medical treatment as of the date a person consults with a physician or seeks other means of obtaining relief from his or her hearing loss. An individual's hearing loss is partially disabling when the average loss demonstrated by medically valid audiometric testing exceeds 25dB at the four frequencies specified in the AMA *Guides* and evidence demonstrates that the worker knew of the hearing limitations. **....Eugene Williams, 95 3780 (1998)** [dissent] [*Editor's Note:* The applicable statute is RCW 51.32.180(b). *Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 98-2-00806-4, Department; Lewis County Cause No. 98-2-00422-1, Employer.] [*Overruled,* in part *Boeing v. Heidy*, 147 Wn 2d 78(2002), *In re Larry Wass*, BIIA Dec., 01 11201 (2002)]

A disease or disability is not manifest unless it is evident, in some fashion, to the worker. However, this knowledge need not necessarily be tied to the notice that the disease or disability is occupationally induced. The date of manifestation of disease or disability is the point in time when contemporaneous medical evidence of disability or need for treatment is coupled with knowledge, on the worker's part, that a disease or disability exists. **....Kenneth Alseth, 87 2937 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-203290-1]**; Charles Jones (II), 87 2790 (1989); Milton May, 87 4016 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-03033-9.] [*Overruled*, in part *Boeing v. Heidy*, 147 Wn 2d 78(2002)]

The 1988 amendment to RCW 51.32.180 did not explicitly overrule the Board's prior decisions applying the date of manifestation rule. Thus, even for claims filed before July 1, 1988, the Board continues to apply the date of manifestation rule to determine the schedule of benefits. **....Kenneth Alseth, 87 2937 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2023290-1]**; Charles Jones (II), 87 2790 (1989); Milton May, 87 4016 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-03033-9.] Rule upheld by *Department of Labor & Indus. v. Landon*, 117 Wn.2d 122 (1991) *Overruled in part*, *Harry v. Buse*, 166 Wn.2d 1 (2009) (occupational hearing case becomes partially disabling on the date the worker was last exposed to hazardous occupational noise.)]

Date of manifestation of disability is the date which determines the applicable schedule of benefits in an occupational disease claim. **....Otto Weil, Dec'd., 86 2814 (1987)** [dissent]

The date of manifestation of disability, not the date of the last injurious exposure, determines which schedule of benefits applies. The date of manifestation in this case was the date the worker's lung was surgically removed, not the date two years later when a physician first notified the worker that his condition was occupational in origin. **....Robert Wilcox, 69,954 (1986)** [dissent]

Schedule of benefits -- beneficiary of deceased worker

When the worker dies from an occupational disease that became manifest after voluntary retirement, RCW 51.32.050(2)(a)(i) requires the wage for pension calculation be set as of the date of manifestation and the wages should be set at the statutory minimum when the worker has no wages as of the date of manifestation. **....Leslie Hood, Dec'd., 05 19216 (2006)** [*Editor's Note*: The Board's decision was appealed to superior court under Cowlitz County Cause No. 06-2-01910-6 & 06-2-01943-2]

The appropriate schedule of benefits is that in effect on the date of the first manifestation of the worker's disease related to occupational exposure. The date of manifestation of

disease or disability is the point in time when contemporaneous medical evidence of disability or need for treatment is coupled with knowledge on the worker's part, that a disease or disability exists. *Citing Department of Labor & Indus. v. Landon*, 117 Wn.2d 122 (1991) **....William Kilpatrick, Dec'd., 89 5200 (1991)** [*Reversed sub nom, Kilpatrick v. Department of Labor & Indus., 125 Wn.2d 222 (1994*) Holding on workers knowledge requirement *reversed In re Boeing Co. v. Heidy* 147 Wn.2d 78 (2002)]

Successive insurers

The State Fund is an insurer for purposes of determining the responsible insurer for an occupational disease claim. The last injurious exposure rule is used to determine the responsible insurer and does not allow apportionment between successive insurers. This rule does not prevent the Department from apportioning claim costs between various state fund employers. **….Cindy Meisner, 95 6101 (1997)** [*Editor's Note:* The Board's decision was appealed to superior court under King County Cause No. 97-2-16495-8 SEA.]

Where distinctive conditions of employment with each employer contributed to progression of worker's condition, the later insurer is responsible for the worsened condition or disability. **....Robert Nelson, 89 3376 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-02863-4.]

The provisions of RCW 51.32.080(3) which require segregation of preexisting conditions cannot be used in an attempt to avoid the "successive insurer rule" prohibiting apportionment. However, employers who take responsibility for current conditions may avoid future responsibility where subsequent employment conditions may constitute a supervening cause of the worsening of the preexisting condition. **....Leonard Roberson, 89 0106 (1990)**

An insurer cannot obtain apportionment of financial responsibility for an occupational disease claim (hearing loss) under the guise of segregating preexisting disability under RCW 51.32.080(3). The insurer on the risk on the date of compensable disability is responsible for the full cost of the occupational disease claim. To obtain segregation under RCW 51.32.080(3) it must be established that the worker's preexisting hearing loss was either not industrially related or that the date of compensable disability of the preexisting loss occurred when another insurer/employer was on the risk. **....Ronald Auckland, 88 4099 (1990)** [dissent] **[***Affirmed sub nom, Weyerhaeuser Co. v. Auckland*, 165 Wn.2d 1005 (1992)]

Although clear apportionment of disability may be medically possible in hearing loss cases as opposed to other occupational disease cases, the Board will not carve out an exception to the rule against apportionment of liability as between successive insurers. The Board adheres to its longstanding rule that the insurer on the risk for an occupational disease claim on the date of compensable disability or last injurious exposure is responsible for the full costs of the claim. **....Lester Renfro, 86 2392 (1988)** [*Affirmed sub nom, Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128 (1991)]

To avoid financial responsibility for an occupational disease claim (hearing loss), the insurer on the risk on the date of compensable disability must prove that the exposure during the period it was on the risk had no effect on the condition. **....Charles Jones (I), 70,660 (1987)**

The insurer on the risk for an occupational disease claim (hearing loss) on the date of compensable disability is not responsible for the costs of the claim if the exposure during

the period the insurer was on the risk had no effect on the condition. **....Frank Johannes, 67,323 (1985)** [dissent]

The insurer on the risk for an occupational disease claim (hearing loss) on the date of compensable disability is responsible for the full costs of the claim if the exposure to which the worker was subjected during the period the insurer was on the risk was "of a kind" contributing to the condition for which the claim was made.
....Roland Lamberton, 63,264 (1984)

Where the evidence established that the hearing loss incurred by the worker after the employer became self-insured was not proximately caused by the work exposure, the employer is not responsible in its self-insured capacity for the hearing loss, since employment conditions during the period of self-insurance were not "of a kind" contributing to the worker's disease. **....David Swendt, 61,790 (1983)**

The insurer on the risk for an occupational disease claim (lung condition) on the date of compensable disability is responsible for the full costs of the claim if the exposure on that date was "of a kind" contributing to the condition for which the claim was made. The date of compensable disability was the date on which the worker was advised by a physician that he had an occupational disease precluding him from gainful employment.
....Forrest Pate, 58,399 (1982)

Where the worker has been subject to two distinct exposures to cedar dust during the course of employment with two different employers, the first self-insured and the second insured with the state fund, and the cedar dust asthma which developed as a result of the first exposure had resolved and had become asymptomatic prior to the second exposure, the worker has two distinct occupational disease claims for the same condition and the financial responsibility for the reoccurrence and progression of his asthma resulting from the second exposure should be borne by the second employer (i.e, the state fund) and not by the self-insured employer. **....Donald Mathis, 58,195 (1982)** [*See* WAC 296-7-870 (6) regarding apportionment of financial responsibility for occupational disease claims among state fund employers]

The insurer on the risk for an occupational disease claim (lung condition) on the date of compensable disability is responsible for the full costs of the claim if the exposure on that date was "of a kind" contributing to the condition for which the claim was made. The date of compensable disability is the date the worker was advised by a physician that he had a disease which was occupational in origin. **....Harry Lawrence, Dec'd., 54,394 (1980)**

The insurer on the risk for an occupational disease claim (hearing loss) on the date of compensable disability is responsible for the full costs of the claim if the employment at that time continued to be "of a kind" which contributes to hearing loss, whether or not it added any specific percentage amount to the worker's hearing loss.
....Winfred Hanninen, 50,653 (1979)

The insurer on the risk for an occupational disease claim (hearing loss) on the date of compensable disability is responsible for the full costs of the claim if the employment at that time continued to be "of a kind" which contributes to hearing loss, whether or not it added any specific percentage amount to the worker's hearing loss. Compensable disability exists when the worker has been notified by a physician that he has an occupational disease and when the disease is causing temporary or permanent disability. **....Delbert Monroe, 49,698 (1978)** [dissent]

Time-loss compensation benefits

A worker may be eligible for time-loss compensation benefits or loss of earning power benefits from the date of manifestation of an occupational disease. **....Rick Yost, Sr., 01 24199 (2003)**

Tinnitus

A claim for hearing loss should not be rejected merely because the loss is not a rateable impairment under the Industrial Insurance Act. *Citing In re Robert MacPhail*, BIIA Dec., 89 3689 (1991). A claim for tinnitus should be allowed where the evidence establishes that the tinnitus exists, that it interferes with worker's daily functioning and is related to noise exposure during the course of employment. **....Lloyd Conrad, 92 0602 (1993)** [concurrence]

Tinnitus is an impairment manifested by different functional responses than hearing loss and, in appropriate circumstances, it must be evaluated in terms of a percentage of total bodily impairment separately from hearing loss. **....Robert Lenk, Sr., 91 6525 (1993)** [concurrence]

Toxic Encephalopathy

A worker presented no objective evidence of exposure to carbon monoxide or insufficient oxygen during employment as a flight attendant and although the medical witness diagnosed hypoxic encephalopathy due to oxygen deprivation or toxic encephalopathy due to carbon monoxide exposure during specific flights, the Department appropriately rejected the claim for occupational disease. **....Nancy Proszek**, **92 6049 (1995)** [*Editor's Note: Intalco Aluminum v. Department of Labor & Indus*., 66 Wn.App. 644 (1992) distinguished because there the facts demonstrated multiple possible causes of neurological damage actually present in the workplace. The worker offered no objective evidence of a damaging incident or damaging exposure. The Board's decision was appealed to superior court under King County Cause No. 95-2-0188-8.]

OFFSETTING PRIVATE INSURANCE BENEFITS AGAINST TIME LOSS COMPENSATION

(See PENALTIES)

PENALTIES (RCW 51.48.017)

(See also ASSESSMENTS, SCOPE OF REVIEW and STANDARD OF REVIEW)

Employer's liability for acts of service company

A self-insured employer which contracts out its claims administration to a private company cannot thereby insulate itself from liability for the service company's acts of

oversight or dereliction, including the delay in the payment of benefits. The acts of a service company are, as a matter of law, the acts of the self-insured employer. **....Sequoiyah Bueford, 63,516 (1983)**

Failure to keep records of employee hours

In assessing a penalty under RCW 51.48.030 for failure to keep records of an employee, the Department may assess a separate penalty for each employee for which records were not kept. **…R & G Probst, et ux, dba Diamond Driving, 00 11968 (2001)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 01-2-02279-0.]

Failure to secure payment of compensation (RCW 51.48.010)

The decision of the Department to assess a penalty for failure to secure the payment of compensation is not discretionary and the Board may review such decision *de novo* based on a preponderance of the evidence standard. In determining the amount of a penalty under RCW 51.48.010 the Department must consider factors including (1) whether the employer intended to avoid the burdens of the Act, (2) the amount of taxes incurred prior to registering with the Department, and (3) whether the employer had a good faith basis for believing it was not subject to the Act. **....Twin Rivers Inn, 89 0684 (1990)**; **C & R Shingle, 88 2823 (1990)**

Failure to submit medical reports (WAC 296-15-070(3))

Where a violation of WAC 296-15-070(3) is established, the Board, in reviewing the amount of the penalty to be assessed, will consider: (1) whether the employer intended to mislead the Department by withholding medical records at the time a determination was requested; (2) the context and significance of the medical records not submitted to the Department; (3) whether the employer in question had been previously found to be in violation of Department rules; and (4) the length of time during which a discovered violation remains unabated after proper notice by the Department that a violation has occurred. **....Carol Buxton, 89 5931 (1991)** [dissent]

In determining the amount of the penalty to be assessed for violating the provisions of WAC 296-15-070(3) the factors that should be considered include, at a minimum, (1) whether the employer intended to mislead the Department by withholding records, (2) the content and significance of the records withheld, and (3) whether the employer had previously been found in violation of Department rules. **....Susan Irmer, 89 0492 (1990)**

Offsetting employment contract benefits against monetary award for permanent partial disability

An employment contract which provides the worker an injury protection benefit requiring the self-insured employer to pay a defined amount to the worker upon injury, but allows the self-insured employer reimbursement from any workers' compensation benefits received does not violate RCW 51.04.060 because it does not diminish the workers entitlement under the Act. A self-insured employer should not be penalized because it does not pay a subsequent award for permanent partial disability that is a lesser monetary award then the injury protection benefit. Once the self-insured employer has paid the injury protection benefit, it is not necessary that it pay a subsequent award for permanent partial disability only to have to recoup the payments.
….Mitch Frerotte, 99 18418 (2001) *Overruling In re David Washington*, BIIA Dec., 67,458 (1986**).** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 01-2-03176-1SEA.]

Offsetting private insurance benefits against time loss compensation

Where a worker has received benefits under the self-insured employer's private insurance program for an injury subsequently determined to be compensable under the Act, the employer cannot withhold from payments of time loss compensation amounts already paid for the same period under the private program. Even though the union contract entitles the employer to reimbursement, RCW 51.32.040 and RCW 51.04.060 prohibit a "setoff" against time loss compensation as a means of enforcing the worker's obligation to repay the private benefits. The self-insured employer's withholding of past due time loss compensation to enforce its right of reimbursement constituted an unreasonable delay in the payment of benefits and the imposition of a penalty under RCW 51.48.017 was proper. **....David Washington, 67,458 (1986)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 86-01139-5.] (Overruled by *In re Mitch Frerotte,* BIIA Dec., 99 18418 (2001)

Review of penalties (RCW 51.48.080)

The decision to assess a penalty pursuant to RCW 51.48.080 is not committed to the discretion of the Department. In an appeal from a penalty assessed by the Department pursuant to RCW 51.48.080, the appellant is entitled to a full *de novo* review, and must prevail if the assessment of the penalty or the amount of the penalty is incorrect based upon a preponderance of evidence. **....Susan Irmer, 89 0492 (1990)**

Side bar agreements

Private agreements to pay an amount not required as a benefit under the Industrial Insurance Act are not contemplated by the Act, and no penalty can be awarded for a delay in the payment. **....Alta Paterson, 05 15987 (2005)**

Standard of review (RCW 51.48.010) – See **STANDARD OF REVIEW**

Unreasonable delay

A self-insured employer can be penalized for an unreasonable delay in the time between making the decision not to contest a payment order and the actual payment of the benefits. **....Jacque Slade, 04 11552 (2005)**

A penalty against a self-insured employer should not be denied merely because the Department had not issued an order requiring the payment. The test is whether the self-insured employer maintained a genuine doubt as to the worker's legal or factual entitlement to the benefits. *Overruling In re Agnes Levings,* BIIA Dec., 99 13954 (2000). **....Jackie Washburn, 03 11104 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 04-2-01401-0.]

The self-insured employer was assessed a penalty for unreasonable delay in the payment of time-loss compensation benefits pursuant to a Board Order on Agreement of Parties. The Department issued a ministerial order based on the Board's order that included the statement of appeal rights, an indication the order would not be final for 60 days. The self-insured employer paid the benefits 34 days after receipt of the order, which was not unreasonable because the statutes do not provide a time frame in which the benefits should be paid, and the ministerial order suggested that the employer should have at least 60 days in which to pay the benefits. **….Agnes Levings, 99 13954 (2000)** [dissent] [*Overruled, In re Jackie Washburn,* BIIA Dec., 03 11104 (2004)]

The test of whether an employer's delay in paying benefits is "unreasonable" within the meaning of RCW 51.48.017, is "whether the employer had a genuine doubt from a medical or legal standpoint as to the liability for benefits." "[G]enerally a failure to pay because of a good faith belief that no payment is due will not warrant a penalty." **....Frank Madrid, 86 0224-A (1987)** [special concurrence] [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 87-2-045534.] (*Principal upheld, Taylor v. Nalley's Fine Foods*, 119 Wn. App 919 (2004))

Unreasonable delay – medical treatment

There is no statutory authority for imposition of a penalty based on a self-insured employer's unreasonable delay in providing medical treatment. **....John Meyer, 03 14702 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 06-2-09086-1.]

WISHA – See **SAFETY AND HEALTH** Penalties

PENSION RESERVE

Calculation

The Department's use of Table C to calculate the pension reserve is consistent with RCW 51.44.070(1) because the statute directs the Department to take into account the experience of the reserve fund in setting annuity values. That the table might not accurately represent current differences in life expectancy does not invalidate the use of Table C because its use adequately reflects the experience of the reserve fund. **....Jose Sanchez, Dec'd., 01 19644 (2004) [***Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 04-2-00582-4.]

Deduction of prior permanent partial disability award (RCW 51.32.080(4)) (Previously RCW 51.32.080(2))

The date of first instance for purposes of deducting awards made for permanent partial disability from the pension reserve must be established by a formal order determining the extent of permanent disability. The date of a cash advance on the permanent partial disability award does not establish the date of the first instance pursuant to RCW 51.32.080(4) **….Michael Woodley, 01 16625 (2002)** [*Editor's Note*: The Board decision was appealed to superior court under Clallam County Cause No. 02-2-00852-9]

RCW 51.32.080(2) directs the Department, where permanent total disability follows permanent partial disability, to deduct a permanent partial disability award from the pension reserve and to reduce the worker's monthly payments accordingly to the extent the award exceeds the amount of benefits that would have been paid the worker if permanent total disability compensation had been paid in the first instance. The "first instance" refers to the first time that the worker receives a permanent partial disability award. *Overruling In re Marshall Stuckey*, BIIA Dec., 89 5977 (1991); *In re Eleanor Lewis*, BIIA Dec., 86 4139 (1988). **....Esther Rodriguez, 91 5594 (1993)** [Principle upheld in *Stuckey v. Department of Labor & Indus.*, 129 Wn. 2d 289 (1996)]

Where the evidence indicates second injury fund relief is appropriate, the self-insured employer is entitled to have the pension reserve charged against the second injury fund as of the date of onset of the worker's permanent total disability, not the date the Department identified as the date it was placing the worker on the pension rolls. **....Harold McCormack, 90 3178 (1992)**

RCW 51.32.080(2) directs the Department, where permanent total disability follows permanent partial disability, to deduct a permanent partial disability award from the pension reserve and reduce the worker's monthly payments accordingly, to the extent the award exceeds the amount that would have been paid the worker if permanent total disability compensation had been paid in the first instance. The Department should not deduct the permanent partial disability award from retroactive time loss compensation. *Citing In re Eino Antilla*, BIIA Dec., 21,097 (1963). **....Marshall Stuckey, 89 5977 (1991)** (*Overruled, In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993)) *(Reversed, Stuckey v. Department of Labor & Indus.*, 129 Wn. 2d 289 (1996))

For purposes of calculating the extent to which the pension reserve may be reduced by a prior permanent partial disability award, the "first instance", as used in RCW 51.32.080, is when the Department first determined that the worker had a particular permanent partial disability and began paying compensation therefor. In this case, there were two dates of "first instance" since the Department increased the permanent partial disability award after the claimant protested the initial closure. **....Dominga Rodriquez, 86 4340 (1988) (***Overruled to the extent decision is inconsistent with In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993))

Only the excess of a permanent partial disability award over the amount the worker would have received had he been awarded a pension in the first instance can be deducted from the pension reserve. **....Eleanor Lewis (I), 86 4139 (1988)** (*Overruled, In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993)) [*Editor's Note*: The Board's decision was appealed to superior court under Skagit County Cause No. 88-2-00145-9]**;Wade Chriswell, 43,742 (1974)** (*Overruled to the extent decision is inconsistent with In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993))

Compensation for and periods of temporary disability may not be considered in determining the extent to which the pension reserve will be reduced by a prior permanent partial disability award. **....John Jensen (II), 32,619 (1970)** (*Overruled to the extent decision is inconsistent with In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993))

Reduction

Where a worker has received time-loss compensation prior to becoming totally, permanently disabled, the amount of such time loss cannot be included in any reduction of the pension reserve determined pursuant to RCW 51.32.080(4). **....Eddy Maupin, 04 14768 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under Clallam County Cause No. 05-2-01161-3.]

Standard of Review

The Department's decision on the appropriate pension reserve amount is reviewable on a preponderance of the evidence standard. **....Jose Sanchez, Dec'd., 01 19644 (2004)** *Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 04-2-00582-4.]

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

(See also PENSION RESERVE)

Ambiguous orders

The Department's language closing a claim "without further award for permanent partial disability" is inherently ambiguous when the order is issued after reconsideration of a previous order paying an award for permanent partial disability. In such circumstance, it is impossible to determine if the Department intended that the award be paid and the doctrine of res judicata likely does not apply to the ambiguous determination. **....Brett Kemp, 02 13145 (2003)**

Amputation value

RCW 51.32.080 contemplates that the amputation of all fingers and the thumb is equivalent to the amputation of the hand at the wrist. An award for amputation value of two fingers therefore takes into account the relationship to loss of function of the hand and no additional award for "general loss of function" of the hand can be made. **....Ellis Blankenship, 30,210 (1970)**

Award after pension determination

When a worker's exposure to noise at work occurred before he was declared permanently and totally disabled and he files a claim for hearing loss after he is declared permanently and totally disabled, the worker may be entitled to a permanent partial disability award for his occupational hearing loss. There is then no legal reason why the filing of an unrelated pension claim should prevent workers from recovering for their hearing loss. *Citing McIndoe v. Department of Labor & Indus*., 100 Wn. App. 64, (2000) which reversed *In re Robert McIndoe*, BIIA Dec., 97 4146 (1998) **….Melvin Moore, 99 17061 (2000)** [*Editor's Note*: The Board's decision was appealed to superior court under Lewis County Cause No. 00-2-00647-9.]

The Department is not required to pay an award of permanent partial disability benefits for a claim that was not pending at the time of the award of benefits for permanent total disability. *Explaining Clauson v. Department of Labor & Indus.*, 130 Wn.2d 580 (1996). **….Robert McIndoe, 97 4146 (1998)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Adams County Cause No. 98-2-00092-2.] [*Reversed, McIndoe v. Department of Labor & Indus*., 144 Wn. 2d 252 (2001).]

Although on the pension rolls under one claim, a worker is not precluded by law from receiving an award for permanent partial disability under another claim if the condition covered under that claim was fixed and stable prior to the date the worker was placed on a pension. **....Roy Sulgrove, 88 0869 (1989)**

Beneficiaries

A beneficiary may be entitled to benefits under RCW 51.32.050 and RCW 51.32.067 if it is established that the disability would have been permanent even if the worker had not died from unrelated causes before treatment was complete. **....James McShane, Dec'd., 05 16629 (2006)**

Category rating

Because the category system requires the finder of fact to evaluate impairment by comparing the category descriptions with the objective findings and physical restrictions, it is erroneous to make a rating based solely on the presence of surgical procedures. **....Michael Hansen, 95 4568 (1996)** (dissent) [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 96-2-20447-1SEA.]

Cervical conditions

The system of permanent impairment ratings contemplates a best fit analysis, thus a finding of neck rigidity is necessary to support a rating equal to category 2, cervical impairments, in the absence of the other physical findings listed in WAC 296-20-240(2). **....Traci Gleason, 92 5936 (1994)**

Chiropractors

A chiropractor is not qualified to testify on the question of permanent partial disability since WAC 296-20-200 and WAC 296-20-01002 provide for evaluation of bodily impairment to be made by a "physician." *Citing Brannan v. Department of Labor & Indus*., 104 Wn.2d 55 (1985). **....Michael McGoff, 90 1897 (1991)** [dissent] [*Editor's Note*: Overruled, in part, *In re Bertha Raminez*, BIIA Dec., 03 14933 (1990).]

Converting premature permanent partial disability award to time loss compensation

Where the Department closed the claim with a permanent partial disability award but subsequently held the claim open and reinstated time loss compensation, it was proper for the Department to "convert" a portion of the premature permanent partial disability award to time loss compensation. **....Eino Antilla, 21,097 (1963)**

Cosmetic defect

Because the worker's burn injury caused a loss of bodily function and not just a cosmetic defect, he was entitled to a permanent partial disability award to compensate him for that loss of function. **....W. Tom Edwards, 26,382 (1967)**

Fixity of all conditions required

When the worker suffers from a psychiatric condition which is not fixed and stable and requires further treatment, the worker is not entitled to an award for permanent partial disability for a low back condition even though it is medically fixed. Awards for permanent disability are made at the time the claim is closed and a claim cannot be both open and closed at the same time. *Citing Franks v. Department of Labor & Indus*., 35 Wn. 2d 763 (1950). **....Bette Pike, 88 3366 (1990)**

Hearing loss – **See OCCUPATIONAL DISEASE**

Interest (RCW 51.32.080 (6))

During the period of time a worker was incarcerated interest does not accrue on the unpaid portion of an award for permanent partial disability benefits. Under RCW 51.32.040(3)(a) payments of benefits are "cancelled" during incarceration. Because there are no benefits owing to the worker during incarceration, it follows that no interest is owed. **….Joseph Barden, 98 13526 (1999)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 99-01076-2]

Interest rate (RCW 51.32.080(4))

The interest rate in effect on the date of injury, not the rate in effect on the date of the award, applies to monthly installments of a permanent partial disability award. **....Teenamarie Callahan, 70,745 (1987)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 94-2-00202-5.]

Migraine headaches

Chronic migraine headaches related to an industrial injury may result in a permanent functional impairment for which a worker is entitled to receive a permanent partial disability award. Where there was no way to measure the impact of the migraine headaches on the worker's functioning except by subjective complaint, a better analogy than cervical spine impairment is found in the mental health condition ratings. **....Candi Truhn, 91 3993 (1993)]**

Multiple levels of the spine

WAC 296-20-250(1)(e) requires that any thoracic impairment that involves the cervical or lumbosacral area be evaluated under the rules for evaluating lumbosacral or cervical impairment. However, the rule is only used when the medical evidence does not permit a distinction when evaluating the conditions. Two separate and distinct areas of impairment allow for separate ratings of the impairment of thoracic and lumbosacral spine. **….David Delozier, 96 4488 (1997) [***Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 97-2-06714-1] [*Reversed, Department of Labor & Indus. v. Delozier,* 100 Wn. App. 73 (2000)]

Option 2 benefits under RCW 51.32.099

Selection of Option 2 vocational benefits under RCW 51.32.099 does not preclude a worker from appealing the closing order and proving entitlement to permanent total disability benefits. Selection of Option 2 vocational benefits does not constitute a compromise and release of other benefits. **….Bill Ackley, 09 11392 (2010)** [dissent]

Pension does not preclude payment of award under another claim – See also Award after pension determination

Pension due to combined effects may preclude payment of award under another claim

Sulgrove does not permit payment of a permanent partial disability award in one claim where a worker was on pension rolls under another claim due to the combined effects of the disability associated with both claims. **....Joanne Lusk, 89 2984 (1991)**

Permanent partial disability award paid in lieu of pension benefits

Even though worker requested permanent partial disability benefits instead of total permanent disability benefits, the receipt of pension benefits is mandatory if a worker is permanently and totally disabled. **....Esther Rodriguez, 91 5594 (1993)** *(Principle upheld in Stuckey v. Department of Labor & Indus., 129 Wn. 2d 289 (1996))*

Permanent partial disability award should not be converted to time loss compensation where permanent total disability follows

RCW 51.32.080(2) directs the Department, where permanent total disability follows permanent partial disability, to deduct a permanent partial disability award from the pension reserve and reduce the worker's monthly payments accordingly, to the extent the award exceeds the amount that would have been paid the worker if permanent total disability compensation had been paid in the first instance. The Department should not deduct the permanent partial disability award from retroactive time loss compensation. *Citing In re Eino Antilla*, BIIA Dec., 21,097 (1963). **....Marshall Stuckey, 89 5977 (1991)** (*Overruled, In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993)) *(Reversed, Stuckey v. Department of Labor & Indus., 129 Wn. 2d 289 (1996))*

Prior permanent total disability determination – See Award after pension

Rating

When the AMA guides on disability do not specify a rating for a particular condition or loss of function, a medical expert may rate by analogy to the "best fit" under the guideline that reflects the worker's particular condition. **....Jana Roening, 04 22220 (2006)**

Rating by Board

The Board can rate a permanent partial disability based on findings of a non-physician expert qualified to make disability-related findings when the record also contains medical evidence establishing the existence of a permanent partial disability. **....Bertha Ramirez, 03 14933 (2004)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No.04-2-25966-S SEA.]

The Board will not evaluate evidence and determine extent of permanent partial disability beyond that given by the Department where the only testimony regarding findings which may support the award is provided by a chiropractor. *In re Donald R. Woody*, BIIA Dec., 85 1995 (1987). **....Michael McGoff, 90 1897 (1991)** [dissent] (Consider application in light of In re Bertha Ramirez, BIIA Dec., 03 14933 (2004)]

The Board may determine that a worker's permanent partial disability is greater than any category testified to by the medical experts, provided the Board's rating is supported by the objective findings in evidence. **....Donald Woody, 85 1995 (1987)**

The Board itself may select a category of impairment based on the medical findings and restrictions even in the absence of medical opinion of a specific category rating. **....Linda Crumpton Donnelly, 54,669 (1981)**

The Board may determine the appropriate category of permanent impairment despite the absence in the record of any medical testimony rating the worker's permanent partial disability in category or percentage terms. The determination requires a comparison of the category descriptions with the medical evidence of the worker's physical or mental restrictions. **....Catherine Schmidt, 57,001 (1981)**

In a non-category case, the Board may rate the worker's permanent partial disability greater than any percentage testified to by the medical witnesses. **....James House, 17,857 (1965)**

Schedule of benefits – See also **OCCUPATIONAL DISEASE** Schedule of benefits applicable

When there are successive injuries to the same region of the body and different schedules of benefits are involved, the worker is entitled to the percentage of total bodily impairment due to the second injury, less the percentage of total bodily impairment from to the first injury, based on the schedule of benefits in effect on the date of the later injury. *Citing Corak v. Department of Labor & Indus*., 2 Wn. App. 792 (1970). **....Michael Midkiff, 95 4715 (1997)**

Segregation

When the compensable disability did not arise before filing the claim regarding the current employer and there is no indication the worker received prior physician notification as required by RCW 51.28.055, segregation of any pre-existing disability is not available to the employer as a successive employer/insurer under *Auckland* rationale. **....Robert Nelson, 89 3376 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-02863-4.]

In applying RCW 51.32.080(3) to segregate preexisting disability, the percentage or category of the entire disability is reduced by the percentage or category of the prior disability. In cases involving disability to the back, it is not appropriate to reduce the

prior disability by 25 percent when determining the disability attributable to the injury. The 25 percent reduction in awards required by former RCW 51.32.080 applies only to the monetary amount of the compensation for disability, not the extent of the disability. **....Clarence Allen, 88 4656 (1990)**

An insurer cannot obtain apportionment of financial responsibility for an occupational disease claim (hearing loss) under the guise of segregating preexisting disability under RCW 51.32.080(3). The insurer on the risk on the date of compensable disability is responsible for the full cost of the occupational disease claim. To obtain segregation under RCW 51.32.080(3) it must be established that the worker's preexisting hearing loss was either not industrially related or that the date of compensable disability of the preexisting loss occurred when another insurer/employer was on the risk. **....Ronald Auckland, 88 4099 (1990)** [dissent] [*Affirmed sub nom, Weyerhaeuser Co. v. Auckland*, 65 Wn. App. 1005 (1992)]

Temporomandibular joint

Temporomandibular jaw [TMJ] injury may result in permanent impairment which warrants payment of a permanent partial disability award. Where the worker's TMJ injury negatively impacted both jaw and cervical spine function, an appropriate disability rating must include consideration of the joint itself as well as related areas -- including cervical spine, speech, dental health, digestion and headache -- where function is diminished. **....Twila Calhoon 92 5813 (1994)**

Tinnitus

Because tinnitus is an impairment manifested by different functional responses than hearing loss and is neither a scheduled impairment nor addressed in the categories contained in WAC 296-20, it must be evaluated in terms of a percentage of total bodily impairment. It is appropriate to analogize to categories of mental health impairment in light of the similarity in the disruption of daily living caused by the worker's tinnitus and that described in the categories of mental health impairment. **....Robert Lenk, Sr., 91 6525 (1993)** [concurrence]

Twenty-five percent reduction (RCW 51.32.080(2))

In applying RCW 51.32.080(3) to segregate preexisting disability, the percentage or category of the entire disability is reduced by the percentage or category of the prior disability. In cases involving disability to the back, it is not appropriate to reduce the prior disability by 25 percent when determining the disability attributable to the injury. The 25 percent reduction in awards required by former RCW 51.32.080 applies only to the monetary amount of the compensation for disability, not the extent of the disability. **....Clarence Allen, 88 4656 (1990)**

The "neck" is not part of the "back" within the meaning of RCW 51.32.080(2), which requires a 25 percent reduction in awards for injuries to the "back" which are not substantiated by "marked objective clinical findings." Cervical awards must therefore be paid at 100 percent of monetary value. **....Kenneth Cox, 86 4543 (1988)** [special concurrence] **[***Note:* The 25 percent reduction authorized by RCW 51.32.080(2) probably only applies to injuries which occurred on or after March 23, 1979 but before July 1, 1988. *See* Laws of 1988, ch. 161 § 6, p. 691.]

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

(See also AGGRAVATION, DIMINUTION OF DISABILITY, PENSION RESERVE, STATUTORY PENSION and SUICIDE)

Age as factor

Where the worker's age (73), and not her physical impairment resulting from the injury, is the predominant factor impairing her ability to be hired, she cannot be considered permanently totally disabled as a result of the industrial injury. **....Violet Canfield, 60,811 (1983)** [concurrence]

Availability of work in geographical area

The worker's residence and particular labor market is a relevant factor, among many, in determining whether a worker is permanently and totally disabled. Rationale of *Dezellem* (BIIA Dec., 23,765 (1966)), that the question of whether an injured worker is permanently totally disabled should not turn on "employment opportunities then present in any particular community," is incorrect as a matter of law. **....Arden Breth, 89 2211 (1990)** [dissent]

Where an injured worker has moved from Washington to another state and subsequently becomes an "odd lot" on the labor market due to aggravation of the industrial injury, the employer cannot meet its burden of establishing that some kind of suitable work is regularly and continuously available to the worker by offering him a job at his former jobsite in the state of Washington. **....Daniel Furlong, 65,138 (1985)** [dissent]

Whether a worker is permanently totally disabled does not turn on employment opportunities present in the worker's particular community, but on the worker's ability to engage in gainful employment. A different result may obtain in an "odd lot" case. **....Lester Dezellem, 23,765 (1966)** [Statement concerning employment opportunities in worker's particular community held "incorrect as a matter of law" by *In re Arden Breth*, BIIA Dec., 89 2211 (1990)]

Beneficiaries

A beneficiary may be entitled to benefits under RCW 51.32.050 and RCW 51.32.067 if it is established that the disability would have been permanent even if the worker had not died from unrelated causes before treatment was complete. **....James McShane, Dec'd., 05 16629 (2006)**

RCW 51.32.010 permits payment of permanent total disability benefits to a custodial parent where a minor was in legal custody of a divorced spouse because RCW 51.32.090(2), regarding payment of compensation for temporary total disability to the person actually providing support for a child, does not apply to payments for permanent total disability benefits. **....Dorsey Hursh, 90 6802 (1991)**

Combined effects of preexisting and subsequent disabilities

Where a worker was on pension rolls under one claim due to the combined effects of the disability associated with that claim, as well as another, the worker cannot receive a permanent partial disability award under the other claim. **....Joanne Lusk, 89 2984 (1991) [***Cf. In re Roy T. Sulgrove*, BIIA Dec., 88 0869 (1989)].

Preexisting disability is segregated only when the worker is determined to be permanently partially disabled, not permanently totally disabled. [RCW 51.32.080(3)] **....Frank Inman, 65,119 (1984)**

A worker may establish permanent total disability by combining the effects of the industrial injury with conditions preexisting the injury and causing a significant physical impairment. Even though the conditions were not discovered or diagnosed until after the injury, they should not be viewed as subsequently occurring events**.** **....Reuben Pister, 61,785 (1983)**

A worker cannot establish permanent total disability by combining the effects of the industrial injury with an unrelated condition preexisting the injury, when there was no discernible disability due to that condition until after the injury had occurred. **....Coral Kaufman, 59,962 (1982)** [dissent]

Where the worker was developing significant medical problems at the time of the industrial injury and those problems subsequently limited his capacity to be employed, he may still be found to be permanently totally disabled as a result of the industrial injury if the injury, independently or superimposed upon the pre-existing circumstances and conditions, was a significant contributing cause of his inability to perform reasonably obtainable work. **....Carlton Hague 59,331 (1982)** [dissent]

A worker is not permanently totally disabled as a result of an industrial injury where only by considering the effects of subsequent unrelated conditions can she be said to be incapable of gainful employment. **....V. Pearl Howes, 58,356 (1982)** [dissent]

A worker cannot establish permanent total disability by combining the effects of the industrial injury with unrelated preexisting dormant conditions which only became symptomatic and disabling after the injury. To establish that the industrial injury was the proximate cause of permanent total disability under a combined effects theory, the worker must show that the injury combined with disability existing at the time of the injury. **....Walter Larson, 21,004 (1966)**

Continuing medical benefits

The Supervisor has discretion to allow post pension treatment pursuant to RCW 51.36.010, including medications which are necessary to alleviate continuing pain. This includes medications which would be palliative, not curative, and it is an abuse of discretion to deny them based only on the palliative nature of the treatment. **....Pablo Garcia, 05 15329 (2006)**

The pension was awarded with second injury fund relief available to the self-insured employer and continuing medical treatment for the worker. Because the second injury fund is not funded to provide for medical benefits, the ongoing medical treatment is the responsibility of the self-insured employer. **….Crella Boudon, 98 17459 (2000)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 00-2-05182-4KNT.]

Deduction of prior permanent partial disability award (RCW 51.32.080(2))

Where the evidence indicates second injury fund relief is appropriate, the self-insured employer is entitled to have the pension reserve charged against the second injury fund as of the date of onset of the worker's permanent total disability, not the date the Department identified as the date it was placing the worker on the pension rolls. **....Harold McCormack, 90 3178 (1992)**

Effective date of pension

The effective date of permanent total disability is the date the worker is both medically fixed and as a vocational matter, demonstrably permanently unable to be gainfully employed on a reasonably continuous basis. *Citing In re Roger Neuman,* BIIA Dec., 97 7648 (1999). The holding contained in the decision of *In re Mickey Chiu,* BIIA Dec. 97 7432 (1999) wherein it was determined the effective date of total disability to be the date of legal fixity is reversed. **…Frederic Cuendet, 99 21825 (2001)**

The worker continued to be totally temporarily disabled until a vocational expert concluded that he was unable to benefit from vocational services. The vocational counselor's assessment and conclusion were necessary to establish vocational fixity and the worker's entitlement to permanent total disability benefits. The earliest date these facts are shown to be in existence is the date of the vocational counselor's assessment report. Accordingly, the date of the vocational counselor's assessment is the effective date of the worker status as permanently and totally disabled. *Citing In re Roger Neuman,* BIIA Dec., 97 7648 (1999). **….James Eddy, 99 18062 (2000)**

The effective date of permanent total disability benefits is the date the worker is both medically fixed and as a vocational matter, demonstrably permanently unable to be gainfully employed. **….Roger Neuman, 97 7648 (1999)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 99-2-18088-7 KNT.]

The effective date of a pension is not merely the date of medical fixity. If totally disabled prior to the effective date of the pension, the worker is entitled to time-loss compensation benefits until the Department acts to change the classification from temporary to permanent. The effective date may be the date the Department first acted to close the claim. *Citing In re Douglas Weston,* BIIA Dec., 86 1645 (1987). **….Mickey Chiu, 97 7432 (1999)]** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 99-2-01327-6.] [*Overruled, In re Frederic Cuendet* ,BIIA Dec., 99 21825 (2001)]

Employment on closing date

Turner (41 Wn.2d 739) does not preclude a pension in the situation where the worker was employed full-time on the date his claim was closed, but in an odd lot position causing "much discomfort" from which he was laid off two months later. **....Richard Chase, 60,114 (1982)** [dissent]

Fixity of condition at time of death from unrelated cause (RCW 51.32.050(6) & 51.52.067)

A beneficiary may be entitled to benefits under RCW 51.32.050 and RCW 51.32.067 if it is established that the disability would have been permanent even if the worker had not died from unrelated causes before treatment was complete. **....James McShane, Dec'd., 05 16629 (2006)**

In a claim for survivor's benefits premised on the worker being permanently and totally disabled at the date of death, the widow must first establish a permanent worsening of the worker's condition between the date his claim was last closed with a permanent partial disability award and the date of his death. The widow is held to the same burden as the worker with respect to the need to prove aggravation of condition. **....Lowrey Pugh, Dec'd., 86 2693 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 89-08880-1.]

Through special concurring opinion the Board majority rejects the holding in *Cowell* that a surviving spouse may be entitled to pension benefits even if the worker's condition was not fixed at the time of his death. **....Larry Alfano, Dec'd., 86 1384 (1988)** [concurrence] Majority of Board accepts holding in *Cowell*, *In re James McShane, Dec'd.*, BIIA Dec., 05 16629. [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No.88-2-01192-3.]

Where, at the time of the worker's death from an unrelated cause, the worker's condition causally related to the industrial injury was neither fixed nor in a state of decline which further treatment could not remedy, and the medical evidence did not establish that she would ultimately be permanently totally disabled, her surviving spouse was not entitled to pension benefits. **....Mabel Gates, Dec'd., 63,850 (1984)** [special concurrence] [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 84-2-00138-7.]

Where the worker's refusal to undergo treatment was reasonable because of the limited prospect for success, and where even if the worker had undergone surgery it would not have affected his ability to return to gainful employment, the worker's condition was fixed at the time of his death and the surviving spouse was entitled to benefits pursuant to RCW 51.32.050(6). **....Robert McIlrath, Dec'd., 65,592 (1984)**

Where, at the time of the worker's death from an unrelated cause, the worker's condition causally related to the industrial injury was not fixed but there was no reasonable likelihood that he would ever have been able to return to gainful employment, the surviving spouse was entitled to benefits pursuant to RCW 51.32.050(6). **....Ronald Cowell, Dec'd., 62,207 (1984)** [dissent] **[***Contra In re Larry Alfano*, BIIA Dec., 86 1384 (1988), followed *In re James McShane, Dec'd.*, BIIA Dec., 05 16629.]

Gainful Employment

Where a worker performs services at a gas station in order to become more active on an intermittent and informal basis, and does not receive wages or any remuneration in exchange for the services, such activity does not constitute a return to gainful employment for wages. **....Nestor Vargas, 89 2000, (1991)** [special concurring opinion]

Obtaining work vs. performing work

Whether a worker can obtain work is not a factor in determining whether the worker is permanently totally disabled**.** The question is whether the worker can perform any substantial gainful employment which exists in the competitive labor market and is within the worker's qualifications. **....Violet Canfield, 60,811 (1983)** [concurrence] [*See Leeper v. Department of Labor & Indus.*, 123 Wn.2d 803 (1994)]

Odd lot

Once it is proved that a worker is precluded from performing light or sedentary work of a general nature, the burden shifts to the Department or employer to prove not only that specific "odd lot" work is available to the worker, but also that such employment would allow the worker to be gainfully employed on a reasonably continuous basis.
....Betty Helm, 87 1511 (1988)

Part-time employment

Part-time employment paying less than full-time employment at minimum wage may not be gainful. **....Norman Pixler, 88 1201 (1989)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 89-2-04666-5.]

Worker, who was a part-time bingo caller at the time of her injury and was capable of returning to such employment, was not deprived of her ability to follow her previous occupation and was therefore not permanently and totally disabled.
....Rose Elliott, 87 4017 (1989) [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 89-2-05748-0.]

An odd lot worker capable of obtaining and performing only part-time or half-time work is not necessarily precluded from permanent total disability status**.**
....Eugene Brixen, 63,381 (1984)

Steady employment at skilled work on a regular basis of four hours per day, five days per week, commencing two days after the closing date and continuing through the hearing date, constitutes work at a gainful occupation within the meaning of RCW 51.08.160 and, as a matter of law, disqualifies the worker from a pension.
....Sterling Taylor, 19,725 (1965) [dissent]

Permanent partial disability award under another claim

Although on the pension rolls under one claim, a worker is not precluded by law from receiving an award for permanent partial disability under another claim if the condition covered under that claim was fixed and stable prior to the date the worker was placed on a pension. **....Roy Sulgrove, 88 0869 (1989)**

Permanent total disability under another claim

Although two claims caused disabilities, separate and distinct, each of which alone was sufficient in and of itself to render the worker permanently and totally disabled, the worker may not receive a double recovery of permanent total disability benefits. **….Lorraine Williams, 07 24841 (2009)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 09-2-01976-1]

Reduction of benefits by prior permanent partial disability award

RCW 51.32.080(2) directs the Department, where permanent total disability follows permanent partial disability, to deduct a permanent partial disability award from the pension reserve and reduce the worker's monthly payments accordingly, to the extent the award exceeds the amount that would have been paid the worker if permanent total disability compensation had been paid in the first instance. The Department should not deduct the permanent partial disability award from retroactive time loss compensation. *Citing In re Eino Antilla*, BIIA Dec., 21,097 (1963). **....Marshall Stuckey**, **89 5977 (1991)** (*Overruled, In re Esther Rodriguez,* BIIA Dec., 91 5594 (1993)) *(Reversed, Stuckey v. Department of Labor & Indus., 129 Wn. 2d 289 (1996))*

Retroactive effective date of pension

A permanent total disability determination is a combination of medical and vocational fixity, and should turn on the facts then in existence. A retroactive determination should be based on the date medical and vocational experts arrive at the determination that a worker is permanently totally disabled. Our decision should not be interpreted as an invitation for parties to establish a date for permanent total disability by the use of hindsight. **….Roger Neuman, 97 7648 (1999)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 99-2-18088-7 KNT.]

Subsequent industrial injury

The disability resulting from a subsequent industrial injury may be considered with preexisting conditions and the residuals of the current claim to determine whether a worker is totally disabled, where both claims are on appeal at the same time. **….Thomas Redeye, 00 13114 (2002)**

Survivors' benefits

A spouse, substituted as the appealing party where the worker died during the pendency of the appeal, who established that the worker was permanently totally disabled as of the date his time-loss compensation benefits were terminated, two years before his suicide, was entitled to benefits under RCW 51.52.050(6). **....William Zygarliski, Dec'd., 89 1094 (1990)**

RCW 51.32.020 only applies when compensability hinges on the cause of the death. That statute does not bar a claim for benefits by a surviving spouse where the worker's death by suicide takes place while the worker is in a status of permanent total disability. **....John Hoerner, Dec'd., 67,267 (1985)** [Rule upheld by *Department of Labor & Indus. v. Baker*, 57 Wn. App. 57 (1990)]

While the death of a worker who commits suicide with intent and deliberation is not compensable under RCW 51.32.020, the surviving spouse is not foreclosed from benefits under RCW 51.32.050(6) if the worker was permanently totally disabled at the time of death. **....Owen Larkin, Dec'd., 18,441 (1965)** [dissent] [Rule upheld by *Department of Labor & Indus. v. Baker*, 57 Wn. App. 57 (1990)]

Termination of benefits (RCW 51.32.160) – See **DIMINUTION OF DISABILITY (RCW 51.32.160)**

Vocational testimony

An opinion by a vocational expert that the worker is unemployable must be based on physical limitations or restrictions imposed by a medical expert. An opinion based on the worker's own statement of limitations is insufficient. **....Lawrence Larsen, 54,979 (1980)**

PETITIONS FOR REVIEW (RCW 51.52.104; RCW 51.52.106)

Issue first raised in petition for review

Where the Department order denied an application to reopen only on timeliness grounds and failed to address the issue of worsening or the need for further treatment, the Board reversed the Department order even though the worker's treatment request was raised for the first time in a petition for review. **....Carol Allen, 91 1837 (1992)**

Order denying appeal

An order denying an appeal cannot be petitioned to the Board but must be appealed to superior court. [RCW 51.52.080] **....Sandra Lucille Walster (II), 43,049, (11/73)**

Scope of review

When a petition for review is filed, the scope of the Board's review extends to all contested issues of law and fact and is not limited to the specific issues raised by the petition for review. **....Richard Sims, 85 1748 (1986)]**

PRIMA FACIE CASE

(See BURDEN OF PROOF and MOTION TO DISMISS)

PROCEDURE BEFORE BOARD

(See BENEFITS PENDING APPEAL, BOARD, BURDEN OF PROOF, DEPOSITIONS, DISCOVERY, INTERVENTION, JOINDER, MOTION TO DISMISS, PETITIONS FOR REVIEW, SANCTIONS, SCOPE OF REVIEW, STANDING and STAYS ON APPEAL)

PROPERTY DAMAGE AS A RESULT OF "INDUSTRIAL ACCIDENT" (RCW 51.36.020)

Breast implant

The replacement of a breast implant is not covered by RCW 51.36.020. Rather, a worker is entitled to this procedure as treatment for the residuals of the industrial injury which deflated the original implant. **....Patsy Schmitz, 68,429 (1986)** [dissent]

Eyeglasses

Damage to eyeglasses is compensable only if the damage was incidental to an accident involving the worker's person. The eyeglasses must have been serving as a body substitute, performing a bodily function, i.e., the worker must have been wearing them at the time the damage occurred, in order for the coverage of RCW 51.36.020 to apply. **....R. J. VanDemark, 43,729 (1974)**

The term "industrial accident" in RCW 51.36.020(4) includes an incident resulting only in property damage. Injury to the person is therefore not a prerequisite for compensation for the cost of repairing eyeglasses damaged in the course of employment**.** **....Helen Adams, 39,929 (1971)**

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

(See also NOTICE OF APPEAL)

Application to reopen treated as protest

After the Department issues an order allowing and closing the claim that does not become final because it is not communicated to the worker, an application to reopen filed by the worker is considered a protest to the order. However, the Department order reopening the claim for aggravation is not a clear or unmistakable determination of claim allowance or rejection. The appeal must be remanded to the Department to act on the worker's timely protest to the order allowing the claim. **….Thomas Hull, 09 10455 (2010)** [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 10-2-33459-9 KNT.]

If an order denying an application to reopen is not communicated to the worker and contains language promising a further order if a protest is filed, a subsequent application to reopen should be treated as a timely protest and request for reconsideration of the first denial of the request to reopen. Following *In re Ronald Leibfried*, BIIA Dec., 88 2274 (1990). Distinguishing *In re Daniel Bazan*, BIIA Dec., 92 5953 (1994). **....Carmel Smith, 95 1795 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 96-2-21023-4.]

It is proper to treat an application to reopen a claim as a protest of the order closing the claim where the evidence indicates the last closing order was never communicated to the claimant. In this case, the Board therefore directed the Department to treat the application to reopen the claim as a protest and to issue a further determinative order concerning the closure of the claim. **....Ronald Leibfried, 88 2274 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 91-2-00015-4.]

An application to reopen a claim, filed by the worker in response to notification from a health care provider that her claim had been closed, can be construed as a timely protest to the self-insured employer's closure order even though it was filed more than sixty days after the order was issued where there is no evidence the order was properly communicated to the worker. **....Valerie Rye, 89 3010 (1990)]**

An application to reopen a claim, filed in response to a Department closing order and within the time allowed for filing an appeal, can be construed as a request that the Department reconsider its closure of the claim, and requires the Department to issue a further final order. **....Charles Weighall, 29,863 (1970)**

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There are no strict requirements on the form of a "protest" or "request for reconsideration", a document will suffice as a protest or request for reconsideration if it is reasonably calculated to put the Department on notice that the party is requesting action inconsistent with the decision of the Department. **....Mike Lambert, 91 0107 (1991)**

A request by the employer that the Department "reassume jurisdiction" constitutes a protest and request for reconsideration. **....John Robinson, 59,454 (1982)**

Deemed-granted application to reopen claim

The employer's ability under RCW 51.52.060(5) to appeal a deemed-granted application to reopen on the merits does not create a comparable ability to protest a deemed-granted application to reopen. **....Stephen Murphy, 02 12603 (2003)**

Department order, once protested, is not final order – See also Protest divests board of jurisdiction

Where the Department's order contains a promise that a further appealable order will follow the filing of a protest, the Department is required to issue a further and final order once a protest has been filed. **....Gerald Wynkoop, 34,133 (1970)**

Filing by mail permissible

A protest from a Department order is effectively filed when it is properly posted in the U.S. Mail on or before the sixtieth day from the date the Department order was communicated to the party. **....Betty Clayberg, 86 4295 (1988)**

Filing by mail, proof of

A protest is timely if it is mailed within the requisite time period, even if it is not received by the Department. However, proof of office custom without proof of compliance with that custom in the specific instance is insufficient to create a presumption that the protest was mailed. *Citing Farrow v. Department of Labor & Indus.*, 179 Wash. 453 (1934) **....Daniel Kelp, 86 0686 (1988)** [*Affirmed sub nom, Kaiser Alum. & Chem. Corp. v. Department of Labor & Indus*., 57 Wn. App. 886 (1990)]

Filing with self-insured employer (WAC 296-20-09701)

WAC 296-20-09701, allowing attending physicians to file requests for reconsideration with the self-insured employer, makes the self-insured employer the agent for the Department for receiving protests from attending physicians. A protest timely filed by the attending physician with the self-insured employer, but not with the Department, therefore constitutes a timely request for reconsideration under RCW 51.52.050. **....Harry Pittis, 88 3651 (1989)**

Limitations on time to act

Where a worker timely protests and requests reconsideration of an order which promises issuance of a further order after receipt of a protest or request for reconsideration, the Department must enter a further order within the time limited by the fifth provision to RCW 51.52.060, with the period commencing on the date the Department received the protest. **....Clarence Haugen, 91 1687 (1991)**

Notice of Appeal – See **NOTICE OF APPEAL**

Must be in writing

In order to be effective, a protest of an order must be in writing. This requirement is not satisfied when a party phones the Department and an employee makes a notation of the phone conversation. *Distinguishing In re Grace Kiser,* BIIA Dec., 88 0710 (1990). **….David Erickson, 97 5247 (1998)**

Protest of "Appealable Only" order

When a firm filed an appeal from an "appealable only" order from which it had already filed with the Department a letter requesting reconsideration within prescribed time limits and the Department had not transmitted the protest to the Board and did not reassume jurisdiction in the later appeal, the Board considered the Department's action an indication of its intent to treat the protest as a notice of appeal. *Citing In re Donzella Gammon,* BIIA Dec., 70,041 (1985). **....Tony Mandrell, 92 2819 (1993)**

When the protest language has been crossed out on an order, so that the Department has made no representation that a further determinative order will be issued, the Department has discretion to determine whether a document challenging its order is a protest or an appeal. If it is the latter, the Department should transmit the appeal to the Board. **....Donzella Gammon, 70,041 (1985)**

Protest divests Board of jurisdiction over appeal

When a worker appealed an order containing a statement of "protest rights", but later filed a protest and request for reconsideration of the same order within the time allowed for protest, the Board lost jurisdiction over the appeal. **....Mark Fossati, 95 1442 (1995)** [*Editor's Note:* the Board encouraged parties to notify it when they have filed a protest after filing an appeal.]

Where a Department order included a statement of protest rights as required by RCW 51.52.050, but did not promise the issuance of a further appealable order after the filing of a protest, a protest to that order deprived the Board of jurisdiction. *Citing In re Santos Alonzo,* BIIA Dec., 56,833 (1981). **....Glen Fulps, 94 7894 (1995)**

A protest automatically operates to set aside and hold an order in abeyance pending the issuance of a further appealable order. Thus, even though an appeal from a Department order had already been filed by the worker, the employer's subsequent but timely protest of the order appealed leaves the Board without jurisdiction to hear the worker's appeal. **....John Robinson, 59,454 (1982)**

When a Department order promises that a further appealable order will be issued if a protest is filed, a timely protest automatically sets the order aside and holds it in

abeyance. The Board therefore lacks jurisdiction to hear an appeal from the original order since it is not a final order. **....Santos Alonzo, 56,833 (1981)**

Self-insured employer's order

A closing order issued by a self-insured employer pursuant to RCW 51.32.055(7)(a) which advises the worker a written protest may be filed within 60 days but does not advise that the order shall become final within 60 days unless such a protest is filed, and which advises the worker to contact the self-insured employer's representative by phone regarding any questions, does not become a final order within 60 days of communication where the worker telephoned the self-insured employer's representative within 60 days to protest the claim closure. **....Grace Kiser, 88 0710 (1990)**

PROVIDERS

Approved examiners lists

The authority given the Director to make decisions regarding a physician's exclusion from the approved examiner's list allows the Director to consider any of the criteria listed in the rule and does not require the existence of all of the criteria. WAC 296-23-26503. **….Kenneth Sawyer, M.D., 01 P0078 (2002)** [*Editors Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 02-2-01400-1]

Audits

The Department is entitled to reimbursement even if the Department had authorized the use of specific billing codes that are subsequently found to be incorrect. If payment is made in an incorrect amount it must be repaid in a manner required by statute. **....Integrated Medical Examiners, LLC, 04 P0067, 2006** [*Editors Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 06-2-00762-7]

Legislative provisions granting authority to the Department to conduct audits and investigations of providers to determine whether the services were appropriate and to enforce sanctions, if appropriate, must be in effect during the audit of the provider's treatment practices. Otherwise, legislative changes which created new obligations and imposed new duties on providers could operate prospectively only. **....Gary Bruner, G.C., D.C., 91 P045 (1992)** [*Editors note: Reversed by implication, Department of Labor & Indus. v. Kantor*, 94 Wn.App. 764 (1999*), review denied*, 139 Wn.2d 1002 (1999).]

Department's authority to regulate out-of-state providers

Every health care provider, defined in statute as "any person, firm, corporation, partnership, association, agency, institution, or other legal entity providing any kind of services related to the treatment of an industrially injured worker" must, as a condition of payment, adhere to the Department's medical aid rules. The Department has authority to compel compliance of out-of-state providers with state regulations for the purposes of Title 51 and the Department's authority to revoke the provider's authorization to treat injured workers was within its delegated authority.
….St. Alphonsus Regional Medical Center, 96 P051 (2000)

Limitations of actions

The provider of medical services provides a service pursuant to a contract with the Department. Accordingly, a six-year statute of limitations for actions under contract applies to the amount of time the Department has to request repayment from a provider. **....Integrated Medical Examiners, LLC, 04 P0067, 2006** [*Editors Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 06-2-00762-7]

Peer review

Where the Department based its determination that a provider received payments to which he was not entitled, upon peer review of the services provided, the Board concluded that after-the-fact review, conducted considerably after the services were provided, for the purpose of recovering monies which the Department had previously determined were properly payable, seems an unwarranted extension of the intent of RCW 51.48.260. **....Gary Bruner, G.C., D.C., 91 P045 (1992)** *[Editors note: Reversed by implication, Department of Labor & Indus. v. Kantor,* 94 Wn.App. 764 (1999*), review denied,* 139 Wn.2d 1002 *(1999).]*

Provider appeals

The Department, in a provider appeal involving recoupment of treatment costs paid, must support its order based on the statutory and administrative provisions in effect during the time of the audit. **....Gary Bruner, G.C., D.C., 91 P045 (1992)** [*Editor's Note*: The decision refers to specific effective dates of certain regulations (WAC 296-20-01002, effective January 1, 1988) which are incorrect.] *[Editors note: Reversed by implication, Department of Labor & Indus. v. Kantor,* 94 Wn.App. 764 (1999*), review denied,* 139 Wn.2d 1002 *(1999).]*

Treatment

The standard by which treatment services are judged is whether they were "proper and necessary" within the meaning of RCW 51.36.010. Where the Department modified its regulations to add a definition of the term "medically necessary", the modified definition applies only to the extent the audit period followed the effective date. **....Gary Bruner, G.C., D.C., 91 P045 (1992)** [*Editor's Note*: The decision refers to specific effective dates of certain regulations (WAC 296-20-01002, effective January 1, 1988) which are incorrect.] [*Editors note: Reversed by implication, Department of Labor & Indus. v. Kantor,* 94 Wn.App. 764 (1999*), review denied,* 139 Wn.2d 1002 (1999).]

PROXIMATE CAUSE

(See also AGGRAVATION, PERMANENT TOTAL DISABILITY and SUBSEQUENT CONDITION TRACEABLE TO ORIGINAL INJURY)

Significant cause

An industrial injury need not be a "significant" proximate cause of a condition; an industrial injury need only be a proximate cause of the condition in order for the condition to be covered under the claim. **....Shauna Guyman, 05 13662 (2006)**

PSYCHOLOGISTS

(See CAUSAL RELATIONSHIP)

REASSUMPTION OF JURISDICTION (RCW 51.52.060)

(See DEPARTMENT)

REFUSAL TO ATTEND MEDICAL EXAMINATION

(See SUSPENSION OF BENEFITS)

RES JUDICATA

(See also AGGRAVATION, APPEALABLE ORDERS and COLLATERAL ESTOPPEL)

Absence of finding concerning previously litigated issue

Where a worker had claimed retroactive time loss compensation in a prior appeal, but the proposed decision and order placing the worker on the pension rolls had not addressed the issue of retroactive time loss, the worker could not establish entitlement to such time loss in an appeal from the subsequent ministerial Department order placing him on the pension rolls. The absence of a finding regarding a disputed material fact must be construed as a finding adverse to the appellant, and his failure to file a petition for review of the prior proposed decision and order made it res judicata that he was not entitled to the retroactive time loss. **....Carl Seltz, 88 1964 (1989)**

Acceptance of condition

Unappealed Department orders reopening the claim for aggravation of condition and paying time loss compensation on the mistaken but unstated ground that the worker's low back condition was causally related to the knee condition for which the claim was filed are res judicata. However, the employer is not foreclosed from later litigating the issue of causal relationship by timely appealing subsequent time loss compensation orders. **....Kerry Kemery, 62,634 (1983)**

Aggravation

An unappealed Department order closing the claim with no permanent disability award is only a res judicata determination that there was no disability at that time due to the injury. It does not mean that any condition existing at that time was unrelated to the injury, absent a specific segregation of the condition by the Department. The worker is therefore not barred from later establishing the causal relationship between the injury and a condition which developed either before or after the date of the closing order. Evidence of worsening of the condition is still required, and the worker may not rely on disability existing as of the closing date to prove such worsening.
....Lyssa Smith, 86 1152 (1988) [dissent]

The *Jessie White* (48 Wn.2d 413) rule, permitting the assumption that there was no disability on the first terminal date where the claim was closed without a permanent partial disability award, is inapplicable where the causal relationship of the condition to the occupational exposure is at issue. The closure of a claim on the first terminal date without a permanent partial disability award does not establish that the worker had no disability on that date, but only that on that date there was no disability attributable to the occupational exposure. **....Mary Burbank, 30,673 (1969)**

The reopening of a claim for treatment does not establish ipso facto an increase in permanent disability but only the existence of a temporary exacerbation requiring remedial medical treatment. **....John Qualls, 28,430 (1969)** [dissent]

The *Jessie White* (48 Wn.2d 413) rule has no application where the evidence establishes the existence of disability on the first terminal date. The failure of the Department to compensate the worker for such disability constitutes a determination that the disability existing at that time was not caused by the industrial injury.
....Leona McCleneghan, 24,922 (1967) [dissent]

Allowance of claim

A final order paying time-loss compensation does not imply claim allowance with sufficient specificity to preclude further adjudication of the allowance issue. **....Darrel Lopeman, 06 13877 (2007) [***Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No.07-2-007744-6]

Although the Board exceeded its scope of review in a prior appeal in this claim when it ordered that the claim be allowed as a "temporary" aggravation of a pre-existing condition, that decision is final and the doctrine of *res judicata* prevents the Board from making a decision inconsistent with the prior determination regarding the temporary nature of the condition. **….Orena Houle, 00 11628 (2001)** [*Editor's Note*: Consider application of holding of In *re Keith Browne*, BIIA Dec., 06 1372 (2007)]

When the Department issues an order expressly addressing the issue of allowance of the claim, and that order is protested by the employer, the Department is obligated to specifically address the allowance issue in a further order. A subsequent determinative time-loss order, which the employer failed to timely protest or appeal, does not preclude the Department from later rejecting the claim. The determinative time-loss order cannot be construed as an implied allowance of the claim since it fails to clearly apprise the employer that the claim has been allowed. **....Gary Johnson, 86 3681 (1987)** [dissent]

Ambiguous orders

Neither res judicata nor collateral estoppel will be accorded to a finding of fact from a prior Board decision when the subject matter of the prior and present appeal is dissimilar, or the earlier determination is ambiguous due to an internal inconsistency. **....Keith Browne, 06 13972 (2007)**

The Department's language closing a claim "without further award for permanent partial disability" is inherently ambiguous when the order is issued after reconsideration of a previous order paying an award for permanent partial disability. In such circumstance, it is impossible to determine if the Department intended that the award be paid and the doctrine of res judicata likely does not apply to the ambiguous determination. **....Brett Kemp, 02 13145 (2003)**

Department orders referring only to a "date of injury" do not clearly establish the "date of manifestation" of an occupational disease and are not considered as res judicata with respect to the date of manifestation. **....Rick Yost, Sr., 01 24199 (2003)**

Clerical Error

If a final order contains a clerical error, the finality of the order does not require that the error be ignored in subsequent litigation. **....Geraldine Gallant, 03 16903 (2004)**

Conditions not explicitly segregated

An unappealed Department order closing the claim with no permanent disability award is only a res judicata determination that there was no disability at that time due to the injury. It does not mean that any condition existing at that time was unrelated to the injury, absent a specific segregation of the condition by the Department. The worker is therefore not barred from later establishing the causal relationship between the injury and a condition which developed either before or after the date of the closing order. Evidence of worsening of the condition is still required, and the worker may not rely on disability existing as of the closing date to prove such worsening. **....Lyssa Smith, 86 1152 (1988)** [dissent]

Extension of time to act on application to reopen claim

An order extending the time for acting on an application to reopen the claim which is not timely appealed is final and binding and has res judicata effect. Worker cannot collaterally attack the unappealed extension decision in a later appeal of an order denying reopening of the claim. **....Clara Morton, 89 5897 (1990)**

Informal letter

Where a worker received a letter determination stating that the rate of time-loss compensation was correct and that a separate order would affirm earlier orders but the worker did not appeal the order subsequently issued, the Board concluded that the order was not res judicata regarding the rate of time loss compensation for the periods set forth in the order since the letter determination had been appealed. **....Lucian Saltz, 92 4309 (1993)**

A Department letter advising the employer that the Department has accepted the worker's low back condition as causally related to the industrial injury is not a formal statutory

order and does not become res judicata if not appealed. **....Kerry Kemery, 62,634 (1983)**

Matters concluded by order rejecting a claim

The doctrine of res judicata does not preclude the worker from obtaining an award for disability for the full extent of his occupational hearing loss when a prior hearing loss claim rejection did not establish the extent of pre-existing hearing loss.
....David Flanigan, 02 18511 (2003)

Occupational Disease

The doctrine of res judicata does not prevent administration of a new claim which involves symptoms in the same body parts involved in a rejected claim, but which is the result of a new disease process. **....Amy Poe, 03 11095 (2004)**

Orders void *ab initio*

Department orders setting the wage without inclusion of the value of worker's health care benefits are not void *ab initio*. Time-loss compensation orders entered with personal and subject matter jurisdiction are not void. To the extent that prior Board significant decisions, *In re Dennis Roberts*, BIIA Dec., 88 0073 (1989) and *In re Rod Carew*, BIIA Dec., 87 3313 (1989), do not reflect the law post *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994), they are overruled.
....Clement McLaughlin, 02 18933 (2003) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 03-2-41325-9SEA.]

Time loss compensation orders based on a legally incorrect computation method are void *ab initio* and a party may challenge the correctness of the amount of time loss compensation even though the statutory time limitation for filing an appeal or request for reconsideration has passed. **....Rod Carew, 87 3313 (1989); Dennis Roberts, 88 0073 (1989)** [*Editor's Note:* Consider impact of *Marley v. Department of Labor & Indus*., 125 Wn.2d 533 (1994) Overruled in *In re Clement McLaughlin*, BIIA Dec., 02 18933 (2003)]

Segregation order

A Department order segregating a condition of "degenerative arthritis" is too ambiguous to have a res judicata effect and does not preclude the worker, in an aggravation case, from establishing that the progression of an arthritic condition in his low back and hip is causally related to the industrial injury. **....Loss Thompson, 13,473 (1962)** [dissent]

Self-insured employer's order

A closing order issued by a self-insured employer pursuant to RCW 51.32.055(7)(a) which advises the worker a written protest may be filed within 60 days but does not advise that the order shall become final within 60 days unless such a protest is filed, and which advises the worker to contact the self-insured employer's representative by phone regarding any questions, does not become a final order within 60 days of communication where the worker telephoned the self-insured employer's representative within 60 days to protest the claim closure. **....Grace Kiser, 88 0710 (1990)**

Subject matter of appeal

Neither res judicata nor collateral estoppel will be accorded to a finding of fact from a prior Board decision when the subject matter of the prior and present appeal is dissimilar, or the earlier determination is ambiguous due to an internal inconsistency. **....Keith Browne, 06 13972 (2007)**

Surviving beneficiary's claim affected by prior adjudication on the merits in worker's claim

In a claim for survivor's benefits premised on the worker being permanently and totally disabled at the date of death, the widow must first establish a permanent worsening of the worker's condition between the date his claim was last closed with a permanent partial disability award and the date of his death. The widow is held to the same burden as the worker with respect to the need to prove aggravation of condition. **....Lowrey Pugh, Dec'd., 86 2693 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 89-08880-1.]

A widow's claim for a survivor's pension based on the contention that the worker was permanently totally disabled at the time of his death, is not barred by a prior determination that the worker's claim for an occupational disease was not timely filed. The prior determination in the worker's claim was not a final adjudication on the merits which, under *Ek* (181 Wash. 91), would bind the widow as well as the worker. **....Harijs Mindenbergs, Dec'd., 48,426 (1977)**

A widow claiming entitlement to a survivor's pension based on the contention that the worker was permanently totally disabled at the time of his death is bound by a prior final adjudication under the worker's claim that the condition causing his disability was not caused by the industrial injury. **....John Biers, Dec'd., 17,754 (1966)**

Time-loss compensation

When the rate of time-loss compensation benefits is properly adjusted, the adjustment is retroactively applicable to all time-loss compensation benefits paid subsequent to the last closing order. **....Roger Crook, 04 10691 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 06-2-02329-3 SEA.]

Prior litigation over entitlement to time-loss compensation benefits for a specific period precludes subsequent litigation over loss of earning power benefits for the same period. **....Rick Yost, Sr., 01 24199 (2003)**

Time within which Department may modify order – See **DEPARTMENT** Authority to modify order

Wages at time of injury

The loss of health care benefits prior to the issuance of a final order setting the wage for time-loss compensation purposes cannot be the basis for a later adjustment due to a change in circumstance under RCW 51.28.040. A judicial change in the interpretation of the law does not affect the finality of the Department's order setting the time-loss compensation rate. **....Rosalie Hyatt, 02 13243 (2003)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 03-2-11626-8.]

A party is not required to appeal or protest a time-loss rate-setting order to apply for an adjustment due to a change of circumstance when the change of circumstance occurs after the order is issued but prior to its becoming final. **....Edward Keeler, 02 16376 (2003)**

Prior litigation over entitlement to time-loss compensation benefits for a specific period precludes subsequent litigation over loss of earning power benefits for the same period. **....Rick Yost, Sr., 01 24199 (2003)**

Once an order expressing the basis for the calculation of time-loss compensation benefits has become final, a change in benefits can occur only if there has been a change in circumstances. A retroactive determination that the worker was entitled to higher wages is such a change in circumstances, and the change in wages may apply to benefits to which the worker was entitled 60 days prior to the application for an increase in benefits. **….Margo Schmitz, 97 5627 (1999)** [dissent] [*Editor's Note:* The decision and order indicates it reverses an order dated April 25, 1997, when, in fact, the decision reversed by the Board order is a letter determination of the same date.]

If there has been a change in circumstances as contemplated by RCW 51.28.040, the rate of time loss compensation may be adjusted irrespective of any previous determination of the rate. **….Charles Stewart, 96 3019 (1998) [***Editor's Note*: The Board's Decision was appealed to superior court under King County Cause No. 98-2-10175-0SEA.]

Because the order establishing all the information necessary for calculation of time loss compensation, including wages at the time of injury, had become final, the worker cannot challenge the calculation in an appeal of a subsequent order paying time loss compensation benefits on the basis that the calculation is based on an incorrect wage at the time of injury. *Citing Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994). **....Tex Prewitt, 95 2064 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Okanogan County Cause No. 96-2-00516-1.]

Where a worker received a letter determination stating that the rate of time-loss compensation was correct and that a separate order would affirm earlier orders but the worker did not appeal the order subsequently issued, the Board concluded that the order was not res judicata regarding the rate of time loss compensation for the periods set forth in the order since the letter determination had been appealed. **....Lucian Saltz, 92 4309 (1993)**

Prior unappealed time loss orders are not res judicata as to the rate of time loss where none had ever informed the claimant of the underlying basis for the rate of time loss compensation (*i.e.*, the gross monthly wages being used for the computation). **....Louise Scheeler, 89 0609 (1990)**

RETROACTIVITY OF STATUTORY AMENDMENTS

Aggravation (RCW 51.32.160)

The 1995 amendment to RCW 51.52.060 reduced the time the Department has to place in abeyance the terms of orders involving applications to reopen claims. If an application to reopen is filed before the effective date, the statutory changes do not apply to the application to reopen. Additionally, even if the 1995 amendments could be applied, the failure of the Department to act within the proscribed time period will not result in the application being "deemed granted." **....Elois Short, 95 4522 (1996)**(dissent)

The 1988 amendments to RCW 51.32.160 were remedial in nature and apply to any application to reopen a claim filed subsequent to the effective date of the amendments, June 9, 1988. **....Marven Sandven, 89 3338 (1990)**

Children's benefits (RCW 51.08.030)

The statute extending benefits to a worker's children beyond the age of 18 while enrolled in school does not apply to children whose parent was injured prior to the effective date of the statute. The law in effect at the time of injury applies. **....Harry Wren, Dec'd., 57,099 (1981)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 81-2-14630-9.]

Interest rate increases (RCW 51.32.080(4))

Where the statutory amendment increasing the rate of interest payable on the monthly installments of a permanent partial disability award became law after the date of the worker's injury, but before the permanent partial disability award was made, the rate of interest in effect on the date of injury applies. **....Teenamarie Callahan, 70,745 (1987)**

Occupational disease statute of limitations (RCW 51.28.055)

The 1984 amendment to RCW 51.28.055, extending the time for filing claims for occupational disease, was intended to operate prospectively only. Where the time for filing a claim under the former statute had started to run prior to the effective date of the amendment (June 7, 1984), the amendment cannot extend the time for filing a claim. **....Herbert Lovell, 69,823 (1986)**

Schedule of benefits applicable in occupational disease claim (RCW 51.32.180)

The 1988 amendment to RCW 51.32.180 did not explicitly overrule the Board's prior decisions applying the date of manifestation rule. Thus, even for claims filed before July 1, 1988, the Board continues to apply the date of manifestation rule to determine the schedule of benefits. **....Kenneth Alseth, 87 2937 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-03290-1]**; Charles Jones (II), 87 2790 (1989); Milton May, 87 4016 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-03033-9.] [Rule upheld by *Department of Labor & Indus. v. Landon*, 117 Wn.2d 122 (1991)]

Social security retirement offset (RCW 51.32.225)

The social security retirement offset of RCW 51.32.225 applies to persons injured before its effective date. *Ashenbrenner* rule, that the law in effect on the date of injury will

control the rights of the worker, is simply a presumption which the courts will apply in the absence of legislative intent to the contrary. Retirement offset exemption contained in RCW 51.32.225(1) only excludes from application of the offset those persons "receiving permanent total disability benefits prior to July 1, 1986." **....Frank Hansen, 87 1408 (1989)** [dissent]; **Lois Oakley, 87 3830 (1989)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 89-2-00991-7.]

Underinsured motorist insurance recovery (RCW 51.24.030)

The 1986 amendments to RCW 51.24.030 were clarifying amendments, at least insofar as they explicitly stated that the Department or self-insured employer has a lien against a worker's recovery under the employer's underinsured motorist coverage. Thus, the 1986 amendments are retroactive, as a legislative interpretation of the original Act, and the Department or self-insurer has a lien against the worker's recovery under the employer's underinsured motorist policy. **....Dale Goers, 88 0661 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-02137-2.]**; Lowell Taylor, 87 3817 (1989)** [*Contra Department of Labor & Indus. v. Cobb*, 59 Wn. App. 360 (1990) *rev. denied*, 116 Wn.2d 1031 (1991). *Cf. O'Rourke v. Department of Labor & Indus*., 57 Wn. App. 374 (1990) *rev. denied* 115 Wn.2d 1002 (1990)]

Wages (RCW 51.08.178)

The 1988 amendments to RCW 51.08.178, which permit the averaging of wages to determine a worker's time loss rate, do not apply to a claim for an injury which occurred prior to the time the amendments took effect. **....Diana Stephens, 89 0717 (1990)**

RETROSPECTIVE RATINGS

(See also ASSESSMENTS and DEPARTMENT)

Relief from retrospective rating assessment

The Department is under no duty to investigate or inform a retrospective rating group of possible consequences related to the group's plan, membership, or other decisions. The Department is not a guarantor of automatic refunds to a retrospective rating group. The participation in the retro group is voluntary and involves risk. **….Northwest Wall & Ceiling Contractors Association, 09 14561 (2010)**
[Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 08-2-00959-6.]

Standard of review – See **STANDARD OF REVIEW** Retrospective rating adjustments

SAFETY AND HEALTH

Amendment of citation

The Board will not allow amendment of a Citation and Notice where defending against the amended citation could involve different witnesses and exhibits than defending against the originally cited rule. **....ABB Power Generation, Inc., 93 W469 (1994)**

The corrective notice of redetermination may be amended to conform to the evidence absent a showing of prejudice to the employer. **....Jeld-Wen of Everett, 88 W144 (1990)**

Appeals

RCW 49.17 does not permit employee to appeal to the Board a Department decision not to conduct an inspection of a work site or issue a citation for alleged violations of Industrial Safety and Health Act. **....Jay Holloway, 91 3679 (1991)**

Authority to issue *nunc pro tunc* order

The Department cited an employer for four safety violations and issued a Corrective Notice of Redetermination assessing a $6,000 penalty arising out of an incident where a worker was electrocuted. In a separate investigation, the Department apparently determined it had been too lenient on the employer. As a result, more than 60 days after issuance of the unappealed Corrective Notice of Redetermination, the Department issued a *nunc pro tunc* order vacating the Corrective Notice of Redetermination. The Board concluded there was no statutory authority to issue a *nunc pro tunc* order. **....American Neon Signs, 94 W346 (1995)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 92-2-04624-5.]

Burden of proof

In an appeal from a Corrective Notice of Redetermination alleging a failure to abate, whether the abatement date was unreasonable is an affirmative defense. The burden of proof is on the employer to establish that the abatement date was unreasonable. **….U.S. Attachments, Inc., 09 W1101 (2010)**

To establish a violation of WAC 296-155-100(1)(a), the Department has the burden of proving a contractor's failure to establish, supervise, and enforce, in a matter that is effective in practice, a safe and healthful working environment. *J. E. Dunn v. Department of Labor & Indus.*, 139 Wn. App. 35 (2007). The Department satisfies its burden by presenting evidence of violations of specific safety standards at the worksite. **....Mediterranean Pacific Corp., 06 W0162 (2007)**

In appeals filed under WISHA, the Department of Labor and Industries has the burden of proving the existence of a violation and the appropriateness of the resulting penalty assessment. **….Olympia Glass Co., 95 W445 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 96-2-04313-1.]

Burden of proof – failure to abate

The Department must prove three elements to establish a prima facie case of failure to abate. First, the original citation must have become a final order; second, the condition on reinspection must be identical; and third, the condition on reinspection must be in violation of WISHA. **….Olympia Glass Co., 95 W445 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 96-2-04313-1.]

Corporate officers

To determine whether "corporate officers" exposed to a hazard are exempted from coverage of safety and health rules, the only relevant factor is whether the corporate officers actually exercised any control over the running of the corporation. **....Framers, Inc., 01 W0465 (2003)**

"Employee misconduct" defense

In order to establish the affirmative defense of employee misconduct, an employer must show that is has established work rules designed to prevent the violation, has adequately communicated those rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered. **....The Erection Company (II), 88 W142 (1990); Jeld-Wen of Everett, 88 W144 (1990)**

"Unpreventable employee misconduct" defense is only relevant when an unsafe action or practice of an employee results in a violation. It is not a defense to a machine guarding violation. **....Jeld-Wen of Everett, 88 W144 (1990)**

Employer (RCW 49.17.020(3))

In leased employment situations, whether the lessor or the lessee should be cited depends on the economic realities of the workplace. Both employers cannot be cited unless they each have substantial control over the workers and the work environment. The employer, for purposes of a WISHA citation, is the employer with control over the work site. **….Skills Resource Training Center, 95 W253 (1997)**

The failure of the employer to contract with a licensed contractor does not establish responsibility for safety violations, the test for responsibility under the statue is whether personal labor is the essence of the contract. *Citing White v. Department of Labor & Indus.*, 48 Wn.2d 470 (1956). **....Kenneth Whitmire and Viola Whitmire, 95 W338 (1996)**

Enforcement of safety standards in federal enclave

Art. 1, Sec. 8, cl. 17 of the Constitution of the United States does not prevent the Department from enforcing WISHA upon the operations of private contractors located within a federal enclave, regardless of the method of acquisition of the enclave by the United States, unless the state legislature ceded exclusive jurisdiction to the United States, and the United States has continually used the property for a purpose enumerated by Art. 1, Sec. 8, cl.17 of the federal constitution. **….General Security Services Corporation, 96 W376 (1998)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 99-2-00176-1SEA, Department' Pierce County Cause No. 99-2-04341-9, Employer.]

Operations at the federal courthouse in Tacoma are subject to WISHA since the land was acquired in 1989 and the governing statute at that time ceded concurrent (rather than exclusive) jurisdiction to the federal government.
….General Security Services Corporation, 96 W376 (1998) [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 99-2-00176-1SEA, Department's, Pierce County Cause No. 99-2-04341-9, Employer.]

Feasibility defense

If an employer wishes to argue that compliance with a safety standard is infeasible, it has the burden of proof of this affirmative defense. An employer must prove that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection. **….Longview Fibre Company, 98 W0524 (2000)**

Federal guidelines

The Department rules that address flagging activities can incorporate standards from the federal Manual on Uniform Traffic Control Devices (MUTCD). Stricter Department standards, however, take precedence over the MUTCD to ensure the safety of workers. **....Hawkeye Construction, Inc., 06 W1072 (2007)** *[Editor's Note: The Board's decision was appealed to superior court under Chelan County Cause No.008-2-00069-3]*

General contractor liability for safe environment

To establish a violation of WAC 296-155-100(1)(a), the Department has the burden of proving a contractor's failure to establish, supervise, and enforce, in a matter that is effective in practice, a safe and healthful working environment. *J. E. Dunn v. Department of Labor & Indus.*, 139 Wn. App. 35 (2007). The Department satisfies its burden by presenting evidence of violations of specific safety standards at the worksite. **....Mediterranean Pacific Corp., 06 W0162 (2007)**

General contractor was cited for failing to establish, supervise and enforce, in a manner that was effective in practice, a safe and healthful work environment as a result of violations by its subcontractor. Proof of a subcontractor's cited safety violation does not, in and of itself, constitute proof that a general contractor's primary safety obligation was not satisfied. A determination as to whether a general contractor has established, supervised and enforced a safe working environment in a manner that is effective in practice involves an analysis similar to that used in evaluating "effective in practice" for the affirmative defense of unpreventable employee misconduct.
….Exxel Pacific, Inc., 96 W182 (1998) [dissent]

General contractor liability - multiple employer worksite

The general contractor on a multiple employer construction site is responsible for its subcontractor's WISHA violation when (1) the violation exposes not only the subcontractor's employees, but also other workers on the site to a safety hazard, (2) the general contractor could reasonably have been expected to prevent or abate the subcontractor's violation by reason of its supervisory capacity over the entire site, and (3) the subcontractor's WISHA violation is obvious. **....R C Construction**, **87 W039 (1989)**
[*See also Stute v. P.B.M.C., Inc.,* 114 Wn.2d 454 (1990)]

General duty standards (WAC 296-24-073)

An employer violated general safe workplace standards where workers were exposed to traffic hazards in reversible lane operation which required workers to maneuver cones from rear bumper of moving truck. To establish a violation of general duty standards, the Department must establish three elements: (1) employer failed to provide a workplace free from hazard; (2) the hazard is recognized; and (3) the hazard is likely to cause death or serious physical injury. **....City of Seattle, 89 W136 (1991)**

Grouped violations

When the department has grouped multiple items in a violation, the vacation of one item does not necessarily result in elimination of the penalty. If the remaining item supports a penalty, the penalty will be assessed. **….Tom Whitney Construction, 01 W0262 (2002)**

Grouping of violations

The Department may group two or more non-serious (general) violations to form a single serious violation (with sub-parts) and assess a penalty so long as the existence of the combined violation created a substantial probability that death or serious physical harm could result therefrom. **….General Security Services Corporation, 96 W376 (1998)**
[*Editor's Note*: The Board's decision was appealed to superior court King county Cause No. 99-2-00176-1SEA, Department; Pierce County Cause No. 99-2-04341-9, Employer.]

Immediate restraint

An order and notice of immediate restraint is void when it is issued by Department at the same time as it declined to renew the contractor's asbestos removal certificate, proscribes prospective action rather than present action, is not the type of order provided for in RCW 49.17.130(1), and exceeds the Department's authority. In light of RCW 49.17.140, which results in an automatic stay upon an appeal to the Board, the Department lacks authority to take any action affecting the asbestos contractor's certificate pending the contractor's appeal of the failure to renew the certificate. The effect of the order of immediate restraint is circumvention of the employer's appeal from certificate nonrenewal; in order to restrain future activities, the Department must seek injunctive relief at the superior court. **....Air Quality Services, Inc., 92 W370-C (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 93-2-00358-3.]

Industry-specific standards

A telecommunications employer was cited for fall violations under standards for operations involving construction work. It was not necessary to amend to a fall protection standard specific to the telecommunications industry because the work being performed when the violation occurred met the broad and inclusive definition for construction work found in WAC 296-115-012.
….Evergreen Utility Contractors, Inc., 98 W0016 (1999) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 00-2-00002-9.]

Leased employees

In leased employment situations, whether the lessor or the lessee should be cited depends on the economic realities of the workplace. Both employers cannot be cited unless they each have substantial control over the workers and the work environment. The employer, for purposes of a WISHA citation, is the employer with control over the work site.
….Skills Resource Training Center, 95 W253 (1997)

Multiple citations

A citation for failing to provide adequate shower facilities at an asbestos removal project must be vacated where the employer is also cited for failure to require workers to shower before entering uncontaminated area since the inadequate or absent shower facility necessarily resulted in workers' failure to shower. The issues are whether the two violations allegedly committed by the employer arose out of the same incident; the violations address the same hazard; and the violation of the first standard logically incorporates a violation of the second standard.
....Walkenhauer & Associates, 91 W088 (1993) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Skagit County Cause No. 93-2-00135-3.]

Order on agreement of parties

Where the parties seek an order on agreement of parties, only the Board has final authority to enter such an order or decline to do so and it will decline to enter an order where the parties' agreement is not supported by the facts and the law. In a WISHA appeal, a misstatement of the controlling law contained in the proposed agreement effectively negates the noteworthy purposes of the written agreement and the Board will

decline to enter the order on agreement of parties. **....Riedel International, Inc., 93 W006 (1993)**

The Board has final authority to enter an order on agreement of parties or decline to do so and an interlocutory appeal will not rise from the industrial appeals judge's statement advising the parties of the Board's willingness to allow particular language in the order. Where the written stipulation included a statement that the employer specifically denied that it violated WISHA, the Board will decline to enter the order on the basis the parties' agreement is not supported by the facts and the law. **....Seattle Fire Department, 92 W241 (1993)**

In an employer's appeal from a WISHA citation, the Board will decline to enter an order on agreement of parties if the employees of the employer object to the entry of the order and the objection is made in good faith and not for an improper purpose. **....Ledcor Industries, 91 W058 (1993)**

Penalties

The authority to assess penalties under WISHA lies exclusively with the Department of Labor and Industries. The Board lacks authority to increase the penalty on its own motion. **….Bergen Brunswig Drug Co. dba Amerisource Bergen Corp., 08 W1080 (2010)**

The Board will review the appropriateness of penalty assessments based on due consideration of the statutory factors contained in RCW 49.17.180(7) and will reject a penalty based on a Department policy that ignores those factors. **….Olympia Glass Co., 95 W445 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 96-2-04313-1.]

When calculating penalties in the case of a county or other local government, the number of personnel within a specific department headed by an elected official are the number of employees in that department, not the number employed by the larger government entity. *Citing Osborne v. Grant County,* 130 Wn.2d 615 (1996); RCW 36.16.070. **….Clark County Public Works, 96 W322 (1998)**

Although the Department may assess a penalty up to ten times the base penalty, it should not do so in every instance. Under the circumstances of this matter, it was appropriate to calculate the penalty for a repeat serious violation by multiplying the base penalty by the number of times the violation had been repeated and to double that amount in an instance of a willful violation. **....Cam Construction, 90 W060 (1992)**

The Department's penalty worksheet is appropriate for calculating penalties, and a serious violation requires some monetary penalty which may be reduced by the employer's attempts to avoid inherent hazards. **....City of Seattle, 89 W136 (1991)**

Process Safety Management

The employer established that its system of training is effective in practice because it developed a comprehensive training program for employees involved in operating a process and performing maintenance. Based on such a showing, the employer is not required to develop or implement an operation manual for training purposes and has not violated regulations pertaining to process safety management.
....Tesoro West Coast Co., 01 W0964 (2004)

Reassumption of jurisdiction by Department

The Department must complete its redetermination within 30 days from when the appeal is filed with the Department from the Citation and Notice. Any redetermination order issued after the 30-day period is invalid and the appeal proceeds to the Board of Industrial Insurance Appeals as a direct appeal from the Citation and Notice. *Citing Erection Co. v. Department of Labor & Indus.*, 121 Wn.2d 513 (1993)]
….Walkenhauer & Associates, 91 W088 (1993) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court in Skagit County, Cause No. 93-200135-3]

Where an employer appeals, in a timely manner, a citation and notice and the Department reassumes jurisdiction pursuant to RCW 49.17.140, the Department's failure to issue a corrective notice of redetermination within 30 working days from the date it reassumed jurisdiction, the Board must consider the appeal as having been taken from the citation and notice, not the corrective notice of redetermination. *Citing The Erection Company v. Department of Labor and Industries*, 65 Wn.App. 461 (1992) [which reversed *In re The Erection Company* (I), BIIA Dec., 88 W134 (1990)]. **....Renton Concrete Recyclers, 91 W085 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 9402012509-5.]

RCW 49.17.140 requires the Department to reassume jurisdiction, complete its informal conference process and issue a corrective notice of redetermination within 30 working days. The Department cannot extend the time for acting by issuing successive reassume orders. However, the failure of the Department to complete the process within the 30-day limit does not deprive the Department of jurisdiction to issue a subsequent corrective notice of redetermination absent a demand by the employer to transmit the original appeal to the Board. **....The Erection Company (I), 88 W134 (1990)** *Reversed in, Erection Co. v. Labor & Industries,* 121 Wn.2d 513 (1993))

Repeat violations

"Final orders" as contemplated by safety and health regulations include Board orders dismissing appeals as well as Board orders remanding to the Department. These are properly included as final orders in the determination of the number of repeat violations. **....Mt. Baker Roofing, Inc., 05 W0549 (2006)** [*Editor's Note*: The Board's decision was appealed to superior court under Whatcom County Cause No. 07-2-00012-3.]

A repeat violation occurs when the employer has been formerly cited for the same type of hazard; the Department is not required to establish that the employer had been previously cited for the same behavior. **….Cobra Roofing Services, Inc., 00 W0760 (2002)** [*Editor's Note*: The Board's decision was appealed to superior court under Asotin County Cause No. 02-2-00051-2.]

Safe workplace rule

With respect to the general safe workplace citation, to establish a violation, the Department must prove the employer failed to provide a workplace free of hazard, which was recognized, and likely to cause death or serious injury. Since the employer's operation involved equipment which was inherently dangerous, the Board considered a fourth criterion, indicating the Department must specify the particular steps an employer should have taken to avoid a "safe place" citation and demonstrate their feasibility. *Citing In re City of Seattle*, BIIA Dec., 89 W 136 (1991).
....ABB Power Generation, Inc., 93 W469 (1994)

Scope of review – **SCOPE OF REVIEW** Safety and Health

"Serious" violation

In determining whether a serious violation has occurred, the focus need not be on only a condition in the workplace, rather, focus may be on whether there is a substantial probability that harm could result from a practice, method or process in use in the workplace. **…William Dickson Company, 99 W0381 (2001)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 02-2-00501-2SEA (EMP), 02-2-03240-1SEA (DEPT).]

In order for a violation to be classified as "serious" there must be a showing that the employer had knowledge of the hazardous conduct or condition and that there was "a substantial probability that death or physical harm could result" from the violation. RCW 49.17.180(6). **....The Erection Company (II), 88 W142 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 90-2-23987-0.]

"Willful" violation

Because an employer had been cited for trenching violations while working in certain soil conditions, and the employer was fully aware of the safety requirements in those soil conditions, its decision not to comply with trenching requirements constituted a "willful" violation since the employer substituted its judgment for the requirement of the safety code and demonstrated either the intentional disregard of or plain indifference to the requirements of the statute. **....Cam Construction, 90 W060 (1992)**

In order to establish that a WISHA violation is "willful" the Department must demonstrate that it involved voluntary action, done either with an intentional disregard of or plain indifference to the requirements of the statute. **....The Erection Company (II), 88 W142 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 90-2-23987-0.]

SANCTIONS

Civil Rule 11

The Board will consider a motion for sanctions based on CR 11 at the time it considers a petition for review. Motions filed for sanctions under RCW 4.84.185 must be filed after a final order. **….Steven Baer, 98 10319 (1999)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 99-2-01464-3.]

A motion for terms pursuant to CR 11 may be considered before a Board order has become final. **….David Harrington, 97 A033 (1999)**

WAC 263-12-125 and RCW 51.52.140 provide that the rules of practice in civil cases shall apply to appeals before the Board. The Board is therefore empowered to impose terms under CR 11 if the facts warrant such a sanction. It was proper to award attorney's fees and costs to a witness required to defend against being recalled to testify concerning documents which a reasonable inquiry would have disclosed to be inadmissible. **....Donald Anderson, 87 3724 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 89-2-11598-1]

Discovery

When considering sanctions for discovery violations, the Board is guided by the principle that it should impose the least severe sanction that does not undermine the purpose of discovery. *Citing Physicians Ins. Exch. v. Fisons Corp.,* 122 Wn.2d 299 (1993). **....Waheed Al-Maliki, 01 14923 (2003)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 03-2-11311-5 KNT.]

Failure to attend CR 35 medical examination

It was proper to require the worker's attorney to personally pay the employer the cancellation fee incurred when, on the advice of the attorney and without notice to the employer, the worker failed to appear at a Board ordered CR 35 examination. **....Harold Thrasher, 55,183 (1982)**

Frivolous defense

RCW 4.84.185, which provides for imposition of sanctions in instances where a defense was frivolous and advanced without reasonable cause, applies in appeals before the Board. A party may not seek sanctions under RCW 4.84.185 until such time as the Board's order is final. **....Don Eerkes, 90 2532 (1992)**

SCOPE OF REVIEW

(See also BOARD, PETITIONS FOR REVIEW, STANDARD OF REVIEW and TIME LOSS COMPENSATION)

Aggravation

A worker is only required to prove that some condition proximately caused by the industrial injury worsened between the terminal dates. It is error to find that one condition did not worsen and another condition did. A claim is either open or closed; it cannot be open with respect to some conditions and closed with respect to others. **….Lulu Anderson, 09 19941 (2010)**

After the Department's decision to reopen the claim for aggravation becomes final, even if based on a mistake of law, the decision defeats any argument relating to the finality of the prior closing order and the reopening order sets the date upon which further benefits can be considered. **….Christopher Preiser, 09 19683 (2010)** [dissent]
[Editor's Note: The Board's decision was appealed to superior court under Snohomish County Cause No. 10-2-09709-9.]

In an appeal from a denial of an application to reopen the claim, the Board has jurisdiction to address an alleged mental health condition, notwithstanding that the order does not specifically indicate the Department considered such condition. **…Donna Jones (Simmons), 99 22362 (2001)**

Where a prior closing order was not communicated to the claimant it was improper to construe a further order denying a subsequent application to reopen the claim as an order affirming the order closing the claim. The issues before the Department on an application to reopen the claim are different from those involved when closing the claim. In this case, the Board therefore directed the Department to treat the application to reopen the claim as a protest and to issue a further determinative order concerning the closure of the claim. **....Ronald Leibfried, 88 2274 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 91-2-00015-4.]

In an appeal from a Department order denying an application to reopen the claim, the Board has jurisdiction to determine whether the worker's disability temporarily worsened during the aggravation period and can award temporary total disability compensation for such period. **....Junior Wheelock, 86 4128 (1987)** [*Editor's Note*: The Board's decision was appealed to superior court under Cause No. 88-2-00404-2.]

When the Department denies an application to reopen for aggravation of condition which has alleged the existence of a new condition and the Board reverses that order, the Board cannot reach the issues of treatment and disability but must remand to give the Department an opportunity to rule on those questions in the first instance. **....Ronald Holstrom, 70,033 (1986)**

Allowance of claim

*In an appeal from an order in which the Department rejected an occupational disease claim the Board's scope of review does not include a determination of the date of manifestation. **….Ronald Spriggs, 07 24270 (2009)**

Although the Board exceeded its scope of review in a prior appeal in this claim when it ordered that the claim be allowed as a "temporary" aggravation of a pre-existing condition, that decision is final and the doctrine of *res judicata* prevents the Board from making a decision inconsistent with the prior determination regarding the temporary nature of the condition. **….Orena Houle, 00 11628 (2001)** [*Editor's Note*: Consider application of holding of *In re Keith Browne*, BIIA Dec., 06 1372 (2007)]

In an appeal involving the allowance of a claim for occupational disease, it is inappropriate for the Board to allow the claim as a "temporary" aggravation of a pre-existing disease. To do so is to go beyond the scope of review and pass upon the extent of permanent disability. Nevertheless, when evidence demonstrates that the worker suffers from a pre-existing, symptomatic and disabling condition a finding in that regard is appropriate since a necessary issue in an allowance case is whether the condition complained of was caused by the occupational exposure. **....Darlene Ross, 88 4379 (1990)** [*Editor's Note*: Explained *In re Orena Houle*, BIIA Dec., 00 11628 (2001).]

Where the Department received letters that the Board determined were an application for benefits and had conducted an investigation, the Board has jurisdiction to direct Department to allow the claim since the Department had the opportunity to adjudicate the alleged back injury. **....Leroy Norris, 92 1471 (1993)**

Assessments

In an assessment appeal where the assessment does not involve a reclassification, the Board will consider any of the factors the Department addressed in calculating assessment, including whether the appropriate classification was used during audit period. To go beyond the audit period would be an unwarranted expansion of the Board's jurisdiction and would intrude on the Department's initial underwriting and risk classification decisions. **....Henry Bacon Building Materials, Inc., 90 0656 (1992)**
[*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 92-2-02279-3.]

Closing order

In an employer's appeal taken from a closing order based on a medical examination through which the Department and the worker agreed to resolve the claim, the issue is limited to the appropriateness of the award for permanent partial disability. The decision to resolve the matter by stipulation could not be appealed because RCW 51.52.050 only authorizes appeals from final determinations. The final determination was the order resulting from the examination, not the decision to examine. **....Anthony Murphy, 94 1233 (1996)**

If the Department had not had the opportunity to address the issue of Second Injury Fund relief, it is inappropriate to make a finding of fact that but for pre-existing conditions the industrial injury-related condition would not have rendered the worker permanently totally disabled. **....Janet Lord, 93 6147 (1996)**

Closing order segregating condition

In an appeal from a Department order closing the claim without award for permanent disability and without denial of responsibility for a contested psychiatric condition, the Board has jurisdiction to determine the extent of disability due to the psychiatric condition where the notice of appeal raised the issue of permanent disability due to the aggravated psychiatric condition and the parties fully tried the issue of psychiatric disability as well as its causal relationship to the injury. **....Merle Free, Jr. 89 0199 (1990)**

Where the Department closes a claim without an award for permanent disability and at the same time denies responsibility for a condition as unrelated to the industrial injury, the Board may, in addition to determining that the condition is causally related to the industrial injury, reach the question of whether the condition renders the worker permanently totally disabled. In this case the Department was fully apprised of the worker's allegation that the condition rendered him permanently totally disabled, had numerous opportunities to consider that issue, and was not prejudiced by any lack of medical evidence as to the extent of disability. **....Anton Worklan, 26,538 (1967)**

Compromise of lien against third party recovery (RCW 51.24.060(3))

Board's review of the Department's discretionary decision regarding the compromise of its lien pursuant to RCW 51.24.060(3) is limited to determining whether or not the Department has abused its discretion. **....Johnny Smotherman, 87 0646 (1989)** [*Compare Hadley v. Department of Labor & Indus*., 116 Wn.2d 897 (1991)] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 89-2-07005.]

Coverage and exclusions

Where it appears a chore service worker, who served on behalf of the Department of Social and Health Services (DSHS) and provided services to a particular individual, is not an employee of DSHS but may be the individual's employee, and where the individual was not a party to the appeal, the Board may not determine that issue in an appeal of a Department order rejecting the claim on the basis that the worker was a domestic servant in a private home. **....Beryl June Davis, 90 3688 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 92-2-14920-6.]

"Deemed granted" application to reopen claim

The Board will address the merits of a worker's entitlement to further benefits in an appeal where an application to reopen has been "deemed granted" when the parties had full and fair opportunity to present evidence concerning whether the worker was entitled to further benefits. **....Margaret Casey, 90 5286 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 92-2-04909-6.]

Department order not communicated

Where the worker had no actual knowledge of the contents of a Department order since it had never been communicated, the worker could not pursue an appeal from the contents of the order. Instead, the Board remanded the matter to the Department to either communicate the order to the worker or to issue a further determinative order. **....Daniel Bazan, 92 5953 (1994)**

Discrimination claims (RCW 51.48.025)

The decision of the Department that the worker failed to file the discrimination complaint within 90 days pursuant to RCW 51.48.025 is reviewable by the Board. **….Joseph Clubb, 10 19226 (2011)**

Employer's appeal of order that holds the claim open

The Department issued an order closing the claim that was protested by the worker and, in response, the Department issued an order that cancelled the closure and held the claim open. The employer appealed and presented a prima facie case for closure. In rebuttal, the worker is allowed to present evidence on medical fixity as well as unresolved vocational and time-loss compensation issues encompassed in the original closure order. **….Susan King, 98 10527 (2000)** [*Editor's Note*: The Board's decision was appealed to superior court in King County, Cause No. 00-2-21596-7KNT]

Fraud determinations

In an appeal from an order demanding repayment of fraudulently obtained time loss benefits, the Board may not consider whether other circumstances warranted repayment, such as those set forth in RCW 51.32.240(1), for "clerical error, mistake of identify, or innocent misrepresentation." **....Del Sorenson, 89 2697 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-01355-6.]

Issues limited by notice of appeal

When the worker appeals and the employer fails to cross-appeal, the Board may not reduce a disability award below that granted by the Department, even though the evidence does not support that award. **....Zotyk Dejneka, 51,408 (1979)** [dissent]

Interlocutory time-loss orders

A worker is aggrieved by an order paying time-loss compensation benefits, even if the Department has designated the decision as temporary, if the worker is disputing the rate of time-loss compensation. **…Robert Uerling, 99 17854 (1999)**

Multiple injuries

Where the Department has rejected a claim for an injury alleged to have occurred on a specific date, the Board does not have jurisdiction to determine whether the worker sustained other injuries on other dates. The notice of appeal cannot expand the Board's authority to decide questions which have not been passed upon by the Department. The worker is not precluded, however, from pursuing additional claims at the Department level. **....Thad Ellis, 42,441 (1974)**

Occupational disease and industrial injury as alternative theories

In an employer appeal of a Department order allowing a claim as an industrial injury, the Board's scope of review extends to whether the claim should have been allowed as an occupational disease. **....Joe Callender, Sr., 89 0823 (1990)** [dissent on other grounds] [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 90-2-06962-0.]

Although the Department order on appeal rejected the claim for the sole reason that the worker's condition was not the result of an industrial injury and the notice of appeal did not allege an occupational disease theory, the Board may nevertheless consider the issue of whether the worker's condition constitutes an occupational disease where the parties, by tacit agreement, tried the case under alternative theories. **....Cathy Lively, 62,097**

(1983) [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 83-2-00722-2.]

Although the Department order under appeal did not specifically reject the claim as an occupational disease, the worker's accident report must be viewed as a claim for benefits for either an injury or an occupational disease, and the Department is obligated to adjudicate the claim under both theories. However, while the Board may have jurisdiction over the occupational disease issue, a remand to the Department was appropriate in this case. **....James McCollum, 62,296 (1983)**

Where the worker has consistently alleged that his carpal tunnel syndrome is the result of a specific injury, the Board is without authority to allow the condition as an occupational disease resulting from the repetitive use of the hand in daily work activities. **....Roy Benson, 53,294 (1980)**

An accident report must be viewed as a claim for compensation for either an industrial injury or an occupational disease and the Department must adjudicate the claim under both theories. The Board therefore had jurisdiction to reach the question of whether the worker's condition was an occupational disease even though the only stated reason for rejecting the claim was that the worker's condition was not the result of an industrial injury. **....Judith Burr, 52,023 (1979)** [dissent]

The issue of whether the worker's condition constituted an occupational disease was properly before the Board even though the only stated reason for rejection of the claim was that the condition was not the result of an industrial injury. The Department had an opportunity to determine whether the claim was allowable as an occupational disease, the worker amended her notice of appeal to include an occupational disease theory, and the employer had the opportunity to meet the occupational disease issue by way of a CR 35 examination. **....Susanne Ryan, 46,094 (1977)** [dissent]

Order terminating pension since worker gainfully employed

Where an order terminating pension is based upon the determination a worker returned to gainful employment, the Board will not consider the question of diminution of the worker's disability. **....Nestor Vargas, 89 2000, (1991)** [special concurring opinion]

Penalty assessments

The Department's decision to assess a penalty under RCW 51.48.010 for failure to secure the payment of compensation is not discretionary. Board review of the Department's penalty assessment is de novo and based on a preponderance of the evidence, as opposed to an abuse of discretion, standard of review. **....Twin Rivers Inn, 89 0684 (1990); C & R Shingle, 88 2823 (1990)**

The decision to assess a penalty pursuant to RCW 51.48.080 is not committed to the discretion of the Department. In an appeal from a penalty assessed by the Department pursuant to RCW 51.48.080, the appellant is entitled to a full de novo review, and must prevail if the assessment of the penalty or the amount of the penalty is incorrect based upon a preponderance of evidence. **....Susan Irmer, 89 0492 (1990)**

Penalty assessment, Director's refusal to assess

The determination whether to assess a penalty is not vested solely in the discretion of the Director, and the Director's decision not to assess a penalty is therefore reviewable by the Board. **....Frank Madrid, 86 0224-A (1987)** [special concurrence] [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 87-2-04553-4.]

Rejected claim

Where the Department rejected a claim on the basis the worker sustained no compensable hearing loss, the issue of permanent partial disability is before the Board if it determines claim should have been allowed. **....Robert MacPhail, 89 3689 (1991)**

Safety and Health

The authority to assess penalties under WISHA lies exclusively with the Department of Labor and Industries. The Board lacks authority to increase the penalty on its own motion. **….Bergen Brunswig Drug Co. dba Amerisource Bergen Corp., 08 W1080 (2010)**

The issues in an appeal of WISHA citations are limited by the notice of appeal pursuant to RCW 49.17.140 and RCW 51.52.070 and as confirmed on the record of proceedings. The Department is not required to present evidence on cited violations that were not in dispute. **….U.S. Engine, Inc., 98 W1057 (1999)**

Second injury fund – See **SECOND INJURY FUND** Jurisdiction

Suspension of benefits

In an appeal from the Department's suspension of a worker's benefits where the Department failed to comply with WAC 296-14-410, the Board reached the merits of whether the worker had good cause for not attending a scheduled examination and concluded it was probable that the worker did not receive prior notice of the examination. **....Johan Petry, 92 0389 (1993)**

Time loss compensation

The fact that the Department is in the process of determining an issue regarding social security offset does not deprive the Board of jurisdiction to hear an appeal from an order determining the basis for the time-loss compensation benefits. **….Ivan Brathovd, 08 22251 (2010)**

In an appeal of an order terminating time-loss compensation benefits, the Board's scope of review extends to consideration of the cause of any conditions impacting employability, even though the Department's prior consideration of such cause and its impact is not shown. **....Jose Aguilar-Vasquez, 03 15196 (2004)**

In an appeal from a determination that RCW 51.08.178(2) is the appropriate section for calculation of wages, the Board's scope of review extends to a determination of whether subsection (1) should be used to calculate wages. **....Ignacio Silva, 01 16231 (2003)**

In a worker's appeal regarding the calculation of the rate of time-loss compensation benefits and social security offset, where the record indicated both calculations needed to be corrected but would result in lower payments to the injured worker, those benefits may

properly be reduced since the calculations are ministerial and the Department cannot ignore the facts established in the appeal. (*Distinguishing Brakus v. Department of Labor & Indus.*, 48 Wn.2d 218 (1956)). **....Loren Denison, 91 5619 (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Stevens County Cause No. 93-2-00066-7.]

The Board is without jurisdiction to consider permanent total disability in appeal from order paying time-loss compensation benefits for a particular period. (*Overruling In re Arthur C. Ryals*, Dckt. No. 87 2998 (September 26, 1989); *Citing In re Betty Connor*, BIIA Dec., 91 0634 (1992)). **....Ann Boyle, 93 3740 (1994)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 94-2-11074-8]

The Board is without authority to consider the issues of fixity of a medical condition or extent of permanent disability in an employer's appeal of an order directing payment of time loss compensation. **....Betty Connor, 91 0634 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 92-2-25991-5.]

The Board is without authority to determine entitlement to time loss compensation for periods of time not covered by the Department order on appeal. **....Tom Camp, 38,035 (1973)**

Vocational rehabilitation determinations

In an appeal from a closing order the Board's scope of review conceivably includes the issue of whether the Department failed to act or failed to follow the process set forth in RCW 51.32.095 or WAC 296-19A regarding vocational services. **….Albina Pascual, 09 20949 (2010)**

Review of Director's decision that a worker is employable, and therefore not eligible for vocational rehabilitation services, is limited to determining whether or not the exercise of the discretionary authority of RCW 51.32.095 has been abused.
....Armando Flores, 87 3913 (1989)

SECOND INJURY FUND (RCW 51.16.120)

Authority to reimburse self-insured employer for overpayment of time-loss compensation benefits

When the self-insured employer has previously paid time-loss compensation benefits for a period after the effective date of the pension, the Department's authority to use the second injury fund for pension payment includes the authority to reimburse the self-insured employer from the second injury fund for payment of the total disability benefits. Recoupment or offset of the overpayment of total disability benefits is the responsibility of the Department of Labor and Industries. **…Frederic Cuendet, 99 21825 (2001)**

Bodily disorder

The term "bodily disorder", as used in RCW 51.16.120, includes a pre-existing personality disorder. **....Lance Bartran, 04 21232 (2005)**

Continuing medical benefit

The pension was awarded with second injury fund relief available to the self-insured employer and continuing medical treatment for the worker. Because the second injury fund is not funded to provide for medical benefits, the ongoing medical treatment is the responsibility of the self-insured employer. **….Crella Boudon, 98 17459 (2000)** [*Editor's Note*: The Board's decision was appealed to superior court in King County, Cause No. 00-2-05182-4KNT]

Date of charge against pension reserve

Where the evidence indicates second injury fund relief is appropriate, the self-insured employer is entitled to have the pension reserve charged against the second injury fund as of the date of onset of the worker's permanent total disability, not the date the Department identified as the date it was placing the worker on the pension rolls. **....Harold McCormack, 90 3178 (1992)**

Jurisdiction

If the Department had not had the opportunity to address the issue of Second Injury Fund relief it is inappropriate to make a finding of fact that but for pre-existing conditions the industrial injury-related condition would not have rendered the worker permanently totally disabled. **....Janet Lord, 93 6147 (1996)**

Knowledge of disabling condition

Prior to a 1984 statutory change to RCW 51.16.120 there was no requirement, other than Department policy, that the employer have knowledge of a worker's pre-existing disability in order to qualify for second injury fund relief. The 1984 change was a clarification and employer knowledge is not a prerequisite to qualification for relief from the fund. **….Marshall Powell, 97 6424 (1999)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 99-2-18528-5.]

Permanent partial disability payment (RCW 51.16.120(1))

Pursuant to RCW 51.16.120(1) a self-insured employer is liable only for the accident costs that would have resulted solely from the industrial injury, had there been no pre-existing disability. When the employer has previously paid a permanent partial disability award to the worker, the employer will not be required to pay a like amount into the pension reserve after a determination that the worker is permanently totally disabled and second injury fund benefits are authorized. **….Fred Dupre, 97 4784 (1999)**

Pre-existing disability

When the worker dies from complications related to surgery required by the industrial injury, a pre-existing disease that causes a significant disability in the body's ability to withstand the surgery is a pre-existing disability for purposes of second injury fund relief. **....Clemma Varner, Dec'd., 06 11288 (2007)**

The mere existence of pre-existing conditions not sufficient to establish that there was a pre-existing disability for purposes of application of second injury fund relief. The record must establish that the pre-existing conditions were disabling. **....Leonard Norgren, 04 18211 (2006)**

To qualify for second injury fund relief, an employer must establish that the disability resulting from the injury would not have been total but for the pre-existing conditions (*Jussila v. Department of Labor & Indus.*, 59 Wn.2d 772, 370 P.2d 582 (1962)). The legislature's reference "from the combined effects thereof" requires a factual finding that the previous injury or disease was an actual cause of the total disability. A pre-existing condition is not necessarily a pre-existing disability, particularly where a worker performs all tasks required of him up to the time of his injury. *Jussila*; *Lyle, Inc. v. Department of Labor & Indus.*, 66 Wn.2d 745, 405 P.2d 251 (1965). **....Alfred Funk, 89 4156 (1991)**

Time loss compensation

Second injury fund relief is not available to an employer for the amount of time loss compensation paid to a worker prior to a determination of permanent total disability. **....Raymond Mitchell, 17,962 (1963)**

SELF-INSURANCE

(See also PENALTIES and DEPARTMENT)

Authority to recoup overpayment of benefits

A self-insured employer is allowed to recoup an excess advance payment of an award for permanent partial disability up to one year after the date the initial Department order establishing permanent partial disability is entered. **....Justin David, 03 11776 (2004)** [dissent]

Where a self-insured employer continued paying time loss compensation benefits due to the mistaken belief it was required to do so until the Department entered an order in response to its request to close the claim, the self-insured employer, is not entitled to recover the benefits under the provisions of RCW 51.32.240(1) since the payment was the result of a mistake of law rather than a clerical error, mistake of identity, or innocent misrepresentation, or any other circumstance of a similar nature. **....Jonathan Cortese, 90 2342 (1992)**

Closing order

RCW 51.32.055(11) allows the Department to adjust benefits when benefits were paid or not paid in a self-insured employer closing order. The fact that the self-insured employer closing order had become final does not ban the Department from requiring the self-insured employer to pay a permanent partial disability award to the worker. **….Dolan Wernet, 08 19992 (2010)**

RCW 51.32.055 allows the Department two years to correct a defective closing order issued by a self-insured employer. **....Michael Leahy, 04 20387 (2005)**

Subsidiaries (WAC 296-15-023)(repealed 1999, *See* WAC 296-15-031)

When one corporation exercised virtually complete authority and influence over a second corporation, controlled the assets of the second corporation, as well as the policy and daily operations through the appointment of the medical director, the second corporation is a subsidiary of the first under the definition in WAC 296-15-023.
….Group Health Permanente, P.C., 98 20064 (2000)

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Adequacy of notice

The six-month limitation on retroactive collection of the offset relates to the date the worker received the benefits, not the dates for which it was paid.
….Billie Davis, 97 3639 (1998) [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 98-2-03368-3.]

"Average monthly wage"

The "average monthly wage", as used for purposes of computing the social security offset, is determined according to the definition contained in the federal statute.
....**Laverne McKenna, 49,873 (1978)**

Computation

The average current wage provisions of 42 U.S.C. 424a, not the definition of wages under Washington State workers' compensation law, governs the calculation of wages for purposes of calculating the social security offset reduction. *In re Laverne McKenna,* BIIA Dec., 49,873 (1978). Accordingly, the inclusion of a healthcare benefit in wages has no effect on the calculation of the offset. **....Andres Pregillana, Jr., 06 14345 (2007)** *[Editor's Note: The Board's decision was appealed to superior court under Kitsap County Cause No.07-2-01124-4]*

In a worker's appeal regarding the calculation of the rate of time-loss compensation benefits and social security offset, where the record indicated both calculations needed to be corrected but would result in lower payments to the injured worker, those benefits may properly be reduced since the calculations are ministerial and the Department cannot ignore the facts established in the appeal. (*Distinguishing Brakus v. Department of Labor & Indus*., 48 Wn.2d 218 (1956)). **....Loren Denison, 91 5619 (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Stevens County Cause No. 93-2-0066-7.]

Computation after reentitlement to benefits

The Department is not bound by the original offset computation where Department previously took reverse offset, ceased taking the offset when social security benefits were terminated, and resumed taking the offset after the Social Security Administration resumed benefits. **....Bruce Gelsleichter, 87 2600 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 89-2-01103.]

Computation based on benefit levels in effect on:

The date of actual notification of concurrent benefits when state periodic benefits commenced before social security benefits. **....Ricky Broderson, 86 4201 (1987)**

The date of constructive notification of concurrent benefits. **....Verlin Jacobs, 66,644 (1985); Selma Hayes, 66,196 (1985); Charles Hamby, 59,175 (1982)**

The date of actual notification of concurrent benefits. **....Donald Clinton, 61,711 (1983); Lee Darbous, 58,900 (1982)**

The date of actual notification of concurrent benefits when the worker is noncooperative in disclosing information. **....Lee Darbous, 58,900 (1982)**

Cost of living increases (COLI's)

Where no offset could be taken when the worker first became entitled to concurrent benefits because the combined state and federal benefits were less than 80 percent of the average current earnings, a future offset can only be taken in the event state cost of living increases have increased the combined benefits so that they exceed the 80 percent limit. Federal cost of living increases cannot be considered to increase combined benefits to the point where an offset can be taken. **....Evelyn Berlin, 86 3615 (1987)**

Effective date of offset

The Department is not prevented from taking the social security reverse offset from a delayed lump sum payment after providing statutory notice that it is taking an offset, even if the delay in payment was due to a bureaucratic delay. *Overruling In re Kenneth Beitler,* BIIA Dec., 58,976 (1982). **....Eddy Maupin, 03 21206 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under Clallam County Cause No.04-2-01200-0. *See also, Potter v. Department of Labor & Indus.,* 101 Wn.App 399 (2006)]

The effective date of a social security disability offset is the first month after the Department notified the worker of its intent to take the offset. The Department may only recoup benefits paid for a period of six months prior to the date of notification in RCW 51.32.220. **…Kenneth Beitler, 58,976 (1982)** [*Overruled, In re Eddy Maupin*, BIIA Dec., 03 21206; *See also, Potter v. Department of Labor & Indus.*, 101 Wn.App 399 (2006)]

Limitation on recovery of overpayment (RCW 51.32.220)

The Department's practice of intentionally overpaying time-loss compensation benefits pending adjustments due to the reverse offset permitted by RCW 51.32.220 does not violate the six month limitation for recoupment of overpayments and is permitted by subsection (5) which requires that a worker's benefits not be reduced to less than they would be entitled without the offset. ….**Elwyn Netherda, 01 23803 (2002)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 03-2-00352-KNT]

If the delay in payment of time loss compensation benefits was not caused by administrative delay, but instead was due to the lack of medical information to support the payment of the benefits the Department is permitted to offset social security benefits from the retroactive benefits, distinguishing *In re Kenneth Beitler*, BIIA Dec., 58,976 (1982). **....June McClure, 95 2208 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No.96-2-02801-2.]

The six month limitation on the recovery of overpayments under RCW 51.32.220 is applicable when the delay in benefits is due solely to bureaucratic inaction following litigation. **....Kenneth Beitler, 58,976 (1982)** [special concurrence] (Holding reversed by *Frazier v. Department of Labor & Indus*., 101 Wn. App 411 (2000), *Potter v. Department of Labor & Indus*., 101 Wn App 399 (2000))

The six month limitation on the recovery of overpayments under RCW 51.32.220 is not applicable when the delay in benefits is caused by litigation. **....James Conrad, 68,967 (1985); Estevan Sambrano, 63,484 (1984)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 84-2-00851-1.]

Loss of earning power benefits

RCW 51.32.220 permits offset of social security disability payments against temporary total disability benefits and permanent total disability benefits. Loss of earning power benefits are not temporary total disability payments and the Department has no statutory authority to offset these benefits. **....Lannie Sellers, 91 3253 (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 93-2-03359-0.]

State offset computed in same manner as federal offset

Where, prior to the initiation of the reverse offset pursuant to RCW 51.32.220, the Social Security Administration has taken the offset pursuant to 42 U.S.C. § 424a, the worker should receive the same combined amount of federal and state benefits, regardless of which jurisdiction is taking the offset. **....Herschel Whitaker, 86 3069 (1988)**

The worker was receiving both social security disability benefits and state time-loss compensation. From December 1979 to February 1, 1981 the Department took the reverse offset. From February 1981 through October 1984 the Social Security Administration took the offset. After the worker became re-entitled to social security benefits, the Social Security Administration again took the offset from December 1984 up to April 1987. When the Department took over the offset in April 1987, it used the same computation that the Social Security Administration had used. Since the worker should receive the same amount of combined benefits, regardless of which jurisdiction takes the offset, the Department's computation of the offset was correct. **....Bruce Gelsleichter, 87 2600 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 89-2-01103.]

Time loss compensation

The fact that the Department is in the process of determining an issue regarding social security offset does not deprive the Board of jurisdiction to hear an appeal from an order determining the basis for the time- loss compensation benefits. **….Ivan Brathovd, 08 22251 (2010)**

The social security disability offset statute, RCW 51.32.220, as compared to the social security retirement offset, RCW 51.32.225, requires the offset be computed in the same manner as the federal government calculates the offset. Where the federal scheme does not provide for separate calculations for offsetting the spouse's or children's portion of the benefits, the offset of social security disability payments against time-loss compensation benefits is based upon the "total family entitlement". (*Distinguishing In re Earl F. Lique*, BIIA Dec., 88 3334 (1990). **....Park Johnson, 91 3189 (1993)**

SOCIAL SECURITY RETIREMENT OFFSET (RCW 51.32.225)

Applicability

Persons not actually receiving permanent total disability benefits on June 30, 1986 (*i.e.*, actually on the pension rolls) are subject to the social security retirement offset. **....Frank Hansen, 87 1408 (1989)** [dissent]; **Lois Oakley, 87 3830 (1989)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 89-2-00991-7.]

Calculation

RCW 51.32.225 does not authorize the Department to offset social security retirement benefits for less than the dollar for dollar amount specified in the statute. **....Howard Lambert, 01 23275 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No.03-2-04978-1 (7/30/03) Cause No. 04-2-00943-4 (2/27/04 after remand).]

Where the worker received social security retirement benefits, the Department was not obliged to separately compute the worker's spouse's portion of benefits. (*Overruling In re Earl F. Lique*, BIIA Dec., 88 3334 (1990)). **....Vernon Strand, 92 1604 (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 93-2-02652-0.]

In calculating the social security retirement offset where the worker has a dependent child, both the dependent child's time loss compensation and federal retirement benefits are considered. However, these amounts are considered separately from the benefits provided to the worker and require separate offset calculations for the worker and the dependent child. *Citing Anderson*, 40 Wn.2d 210 (1952) and *Gassaway*, 18 Wn. App. 747 (1977). **....Earl Lique, 88 3334 (1990)** (*Overruled* in *In re Vernon Strand*, BIIA Dec., 92 1604 (1993)) [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 90-2-02984-6.]

RCW 51.32.225 authorizes a dollar-for-dollar reduction of temporary or permanent total disability benefits by the amount of the social security retirement benefits. Procedures for computing the social security disability offset, contained in RCW 51.32.220, do not apply to the social security retirement offset of RCW 51.32.225. **....Lois Oakley, 87 3830 (1989)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 89-2-00991-7.]

Effective date of offset

The Department is not prevented from taking the social security reverse offset from a delayed lump sum payment after providing statutory notice that it is taking an offset, even if the delay in payment was due to a bureaucratic delay. *Overruling In re Kenneth Beitler,* BIIA Dec., 58,976 (1982). **....Eddy Maupin, 03 21206 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under Clallam County Cause No.04-2-01200-0. *See also, Potter v. Department of Labor & Indus.,* 101 Wn.App 399 (2000)]

No federal pre-emption of social security retirement offset

There is no authority for the Social Security Administration to take an offset of state workers' compensation benefits against social security retirement benefits where the individual is not also receiving social security disability benefits. Absent such authority the state is not pre-empted from enacting legislation allowing the offset of social security retirement benefits against state workers' compensation benefits.
....Lois Oakley, 87 3830 (1989) [dissent]

STANDARD OF REVIEW

(See also SCOPE OF REVIEW)

Claims Administration

When there is a dispute regarding claim administration not related to the actual adjudication of entitlement to benefits, the standard of review is abuse of discretion. **….Gail Conelly, 97 3849 (1998)**

Medical bills

The payment or rejection of medical bills is not discretionary with the Department. The test is whether the bills conform to the provisions of RCW 51.04.030, the applicable rules and regulations, and the practices of the director. **....Gary Manley, 66,115 (1986)**

Penalty assessments

The Department's decision to assess a penalty under RCW 51.48.010 is not committed to the discretion of the Department. In an appeal from a penalty assessed by the Department pursuant to RCW 51.48.010, the appellant is entitled to a full de novo review, and must prevail if the assessment of the penalty or the amount of the penalty is incorrect based upon a preponderance of the evidence. *Citing In re C & R Shingle,* BIIA Dec., 88 2823 (1990). **....Sawyers Motor Sports, 90 3344 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Franklin County Cause No. 92-2-50196-4.]

The Department's decision to assess a penalty under RCW 51.48.010 for failure to secure the payment of compensation is not discretionary. Board review of the Department's penalty assessment is de novo and based on a preponderance of the evidence, as opposed to an abuse of discretion, standard of review. **....Twin Rivers Inn, 89 0684 (1990); C & R Shingle, 88 2823 (1990)**

The decision to assess a penalty pursuant to RCW 51.48.080 is not committed to the discretion of the Department. In an appeal from a penalty assessed by the Department pursuant to RCW 51.48.080, the appellant is entitled to a full de novo review, and must prevail if the assessment of the penalty or the amount of the penalty is incorrect based upon a preponderance of evidence. **....Susan Irmer, 89 0492 (1990)**

Pension reserve calculation

The Department's decision on the appropriate pension reserve amount is reviewable on a preponderance of the evidence standard. **....Jose Sanchez, Dec'd., 01 19644 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under Yakima County Cause No. 04-2-00582-4.]

Provider revocation

A Department decision to revoke a provider's eligibility to treat Washington injured workers and be reimbursed is subject to de novo review based on a preponderance of the evidence since none of the relevant statutes and regulations define the Department's decision making process in terms of being within the "sole discretion" of the director. **….St. Alphonsus Regional Medical Center, 96 P051 (2000)**

Removal of physician from approved examiners list

In a physician's appeal of a decision to remove the physician from the approved examiner's list, pursuant to WAC 296-23-26503, the standard of review is a preponderance of evidence. **…Harry S. Reese, M.D., 00 P0044, (2001)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 01-2-01713-3(DEPT) and (PROVIDER).]

Retrospective rating adjustments

The Department may have the authority, by regulation, to limit review of retrospective rating and claim valuation decisions at the Department. However, the Department cannot, simply by regulation, restrict or eliminate the Board's review of these types of Department decisions. Absent explicit legislative prohibition, Department orders concerning retrospective ratings are both appealable to and reviewable by the Board under the general terms of Chapter 51.52 RCW.
....Washington Metal Trades Association, 89 2296 (1990)

Time loss compensation benefits as part of vocational rehabilitation plan

When time loss compensation benefits are ordered under RCW 51.32.095(3) as part of a vocational rehabilitation plan, the standard of review is abuse of discretion.
….Michael Pinger, 97 2210 (1998) [*Editor's Note*: The Board's decision was appealed to superior court under Grays Harbor County Cause No. 98-2-01511-6.]

Vocational rehabilitation determinations

Review of Director's decision that a worker is employable, and therefore not eligible for vocational rehabilitation services, is limited to determining whether or not the exercise of the discretionary authority of RCW 51.32.095 has been abused. **....Todd Eicher, 88 4477 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 90-2-01106-4.]; **Armando Flores, 87 3913 (1989)**

Vocational rehabilitation vs. time loss compensation

Review of Director's decision that a worker is "employable," and therefore not eligible for vocational rehabilitation services, is limited to whether or not the discretionary authority of RCW 51.32.095 has been abused. However, review of a determination that a worker is "employable," and therefore not eligible for time loss compensation under RCW 51.32.090, is de novo, subject only to a "preponderance of the evidence" standard of review. **....Christine Palodichuk, 90 0252 (1990)**

Waiver of time limit for reopening claims

In an appeal of Director's letter refusing to waive the time limit for filing an application to reopen the claim, the standard of review is whether the decision not to waive the time limit constitutes an "abuse of discretion." **....Ernest Therriault, 90 0876 (1990)**

STANDING

Although the Atomic Energy Commission (AEC) was not the worker's employer, the Defense Project Insurance Rating Plan Contract between the Department and the AEC, authorized by Chapter 144, Laws of 1951, makes the AEC a party in interest in all claims arising out of work done by contractors or subcontractors at the Hanford Works. The AEC is therefore a "person affected" within the meaning of RCW 51.52.050 and has standing to appear in proceedings before the Board. **....John Schatz, 25,823 (1968)** [dissent]

STARE DECISIS

Unpublished opinions of superior courts are not part of the state's common law and have no precedential value or binding effect. **....Lisa Soden, 85 2993 (1987)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 87-2-05759-3.]

STATUTES

(See also RETROACTIVITY OF STATUTORY AMENDMENTS)

Substantial compliance

A Department order which is defective with regard to the statutorily mandated type size substantially complies with notice requirements, absent a showing that the defect prejudiced the worker. **....Eugene Jackl, 86 2528 (1988)**

STATUTES OF LIMITATION

(See NOTICE OF APPEAL, TIMELINESS OF APPLICATION TO REOPEN CLAIM, TIMELINESS OF CLAIM, PROTEST AND REQUEST FOR

RECONSIDERATION and RETROACTIVITY OF STATUTORY AMENDMENTS)

STATUTORY AMENDMENTS

Effective date – See **RETROACTIVITY OF STATUTORY AMENDMENTS** Aggravation

STATUTORY PENSION (RCW 51.08.160)

The statutory pension provisions of RCW 51.08.160 entitle a quadriplegic worker to receive time loss compensation even though he is engaged in full-time gainful employment. **....Jerry Belton, 85 2107 (1987)** [special concurrence]

STAYS ON APPEAL

(See also BENEFITS PENDING APPEAL)

Effect of appeal to Board on Department's order

Where a provider appeals the Department's suspension of authorization to be paid for services to injured workers, the appeal necessarily stays further action and suspends the order pending a decision by the Board. **....Gary Bruner, G.C., D.C., 91 P045 (1992)** [*Editor's Note: Reversed by implication, Department of Labor & Indus. v. Kantor,* 94 Wn.App. 764 (1999*), review denied,* 139 Wn.2d 1002 (1999).]

Where a provider appeals the Department's suspension of authorization to be paid for services to injured workers, the appeal necessarily stays further action and suspends the order pending a decision by the Board. *Citing State ex rel Crabb v. Ollinger*, 191 Wash. 535 (1937). **....Steven Zwiener, D.C., 91 P001 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 91-0-01527-6.]

Effect of appeal to superior court on Department's authority to take further action on claim

In the absence of a court order staying the implementation of a Board order affirming a Department order reopening the claim, the Department may take further action on the claim while the employer's appeal is pending in superior court and may issue an order determining that the worker is permanently totally disabled. **....Harold Heaton, 68,701 (1986)** [dissent]

SUBSEQUENT CONDITION TRACEABLE TO ORIGINAL INJURY

(See also AGGRAVATION)

Aggravation by treatment

Conditions resulting from treatment for the industrial injury are considered part and parcel of the injury itself. A cardiac arrhythmia caused by the stress of surgery is therefore attributable to the industrial injury. **....Arvid Anderson, 65,170 (1986)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 86-2-04442-1.]

Injury sustained en route from vocational appointment

A new injury, suffered when the worker is involved in an auto accident on the way back from a required vocational appointment, is covered. The new injury is related to the original injury and is a compensable consequence of the original injury.
....Iris Vandorn, 02 11466 (2003)

Migraine headaches

In the absence of other possible triggers together with the report of migraine complaints within a month following a head or neck injury, a chronic migraine headache condition was causally related to the industrial injury. **....Candi Truhn, 91 3993 (1993)**

New incident aggravating prior injury

The occurrence of a new injury and an aggravation of a preexisting condition are not mutually exclusive. Whether a worker's worsened condition is a result of a new incident or constitutes an aggravation of the original injury depends upon whether the new incident is a supervening cause, independent of the original injury. The real question is one of proximate cause, *i.e.*, whether "but for" the original injury the worker would not have sustained the subsequent condition. **....Robert Tracy, 88 1695 (1990)**

In determining whether a new incident is the cause of a worker's further disability it is appropriate to apply the analysis used in new injury or aggravation cases. However, whether the incident was a new injury or an aggravation of the preexisting industrial condition is not determinative, as the two notions are not mutually exclusive. The issue is whether the incident constitutes a supervening, independent cause. Where trauma of the further incident is no greater than that suffered as a result of the incidents of normal daily living and but for the original injury the further disability would not have occurred, the new incident is not a supervening cause of the subsequent disability.
....Mary Wardlaw, 88 2105 (1990) [dissent, on ground new incident constituted supervening independent cause]

Worry over industrial injury causing further condition

A heart attack caused by worry over the physical residuals of an industrial injury is compensable as part of the injury. **....George Gillilan, Dec'd., 24,780 (1967)** [special concurrence]

SUCCESSIVE INSURERS

(See OCCUPATIONAL DISEASE)

SUICIDE (RCW 51.32.020)

Permanent total disability at time of death (RCW 51.32.050(6))

A spouse, substituted as the appealing party where the worker died during the pendency of the appeal, who established that the worker was permanently totally disabled as of the date his time-loss compensation benefits were terminated, two years before his suicide, was entitled to benefits under RCW 51.52.050(6). **....William Zygarliski, Dec'd., 89 1094 (1990)**

RCW 51.32.020 only applies when compensability hinges on the cause of the death. That statute does not bar a claim for benefits by a surviving spouse where the worker's death by suicide takes place while the worker is in a status of permanent total disability. **....John Hoerner, Dec'd., 67,267 (1985)** [*Rule upheld* by *Department of Labor & Indus. v. Baker*, 57 Wn. App. 57 (1990)]

While the death of a worker who commits suicide with intent and deliberation is not compensable under RCW 51.32.020, the surviving spouse is not foreclosed from benefits under RCW 51.32.050(6) if the worker was permanently totally disabled at the time of death. **....Owen Larkin, Dec'd., 18,441 (1965)** [dissent] [Rule upheld by *Department of Labor & Indus. v. Baker*, 57 Wn. App. 57 (1990)]

Volitional act

Suicide does not bar compensation unless it is a volitional act, i.e., the product of a free exercise of choice. **....David Erickson, Dec'd., 65,990 (1985)**

SUMMARY JUDGMENT

(See BOARD)

SURVIVORS' BENEFITS

(See BENEFICIARIES, PERMANENT TOTAL DISABILITY, RES JUDICATA, SUICIDE, THIRD PARTY ACTIONS and TIMELINESS OF CLAIM)

Aggravation

In a claim for survivor's benefits premised on the worker being permanently and totally disabled at the date of death, the widow must first establish a permanent worsening of the worker's condition between the date his claim was last closed with a permanent partial disability award and the date of his death. The widow is held to the same burden as the worker with respect to the need to prove aggravation of condition.
....Lowrey Pugh, Dec'd., 86 2693 (1989) [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 89-08880-1.]

In a surviving spouse's appeal of a Department order denying the claim for spousal benefits on the basis the worker was not totally permanently disabled on the date of his death, the Board cannot reach the issue of permanent total disability when the worker's appeal of an order denying an application to reopen was pending at the time of death. *Citing Reid v. Department of Labor & Indus.*, 1 Wn.2d 430 (1939). **....David Harvey, Dec'd., 94 1271 (1996)**

Timeliness of claim – See **TIMELINESS OF CLAIM**

SUSPENSION OF BENEFITS (RCW 51.32.110)

Failure to comply (WAC 296-14-410)

The worker/appellant has the burden of proving that the Department did not comply with WAC 296-14-410(4)(a), which requires the Department to provide an opportunity to explain an apparent failure to cooperate prior to the suspension of benefits. **....Gail Hanson, 04 14071 (2005)**

Where the Department suspended worker's benefits without first requesting written explanation of why worker failed to attend scheduled examination, it failed to comply with WAC 296-14-410. **....Johan Petry, 92 0389 (1993)**

A self-insured employer complied with WAC 296-14-410 when it forwarded notification of examination, plane ticket, and meal check to a worker's attorney where the worker had earlier directed the employer to forward all of his mail to the attorney's office. Because the employer failed to request in writing an explanation for the refusal to attend an examination before suspension of benefits, neither the Department nor the self-insured employer complied with the regulation. **....Luis Lopez, 91 3608 (1992)**

Suspension of benefits is improper where the Department has failed to comply with the requirements of WAC 296-14-410 that the Department request, in writing, from the worker the reasons for the non-cooperation or refusal to attend an examination and allow thirty days for response. **....Willie Dunn, 91 0602 (1992)**

Good cause

Suspension of benefits for non-cooperation requires behavior that obstructs or delays the administration of a claim. The behavior must be deliberate and calculated to obstruct. Behavior that is not designed or intended to obstruct or delay is not non-cooperation. A worker who is willing, although unable, to discontinue his use of tobacco has not refused to cooperate and his benefits may not be suspended for non-cooperation. **....John Galen, 03 18491 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under Whatcom County Cause No. 04-2-02677-2.]

When an injured worker asserts that the Department's lack of authority to schedule a needless or unnecessary examination is the basis for good cause not to attend, the worker must establish a prima facie case that the examination was unnecessary before the Board will conduct a balancing of the factors set forth in *In Re Bob Edwards*, BIIA Dec., 90 6072 (1992). **....Estela Romo, 94 3874 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 96-2-00212-3.] [Affirmed, *Romo v. Department of Labor & Indus.*, 92 Wn. App. 348 (2004)]

The factors used to determine whether a worker had good cause to refuse to undergo examination include the worker's physical capacities, sophistication, circumstances of employment, family responsibilities, proven ability or inability to travel, medical treatment and other relevant concerns, including the expectation of a fair and independent medical examination balanced against the need to resolve conflicting medical documentation, the location of willing and qualified physician, the length of time before a physician is available to perform an examination, and the comparative expense of such. **....Bob Edwards, 90 6072 (1992)**

No show fees

It is inappropriate to rely upon RCW 51.32.110 and WAC 296-14-410 to assess fees against a worker for failure to appear for an examination when it is subsequently determined the worker's claim is not valid. Those provisions anticipate repayment only where there is not good cause for failing to appear for scheduled examinations and can only be recovered from future benefits -- either time-loss compensation or medical treatment benefits. **....Laurie Anderson, 93 3571 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 96-2-05615-0.]

Refusal to attend medical examination

The Department inappropriately suspended benefits due to a worker's failure to attend an examination scheduled in Washington when the worker resided in Mexico and was unable to obtain visa for legal entry. **....Ramiro Madrigal, 91 2559 (1993)**

A worker has good cause for not attending a medical examination where the worker attempted to use travel arrangements scheduled by the Department the day before his travel but was unable to do so due to the lack of notice by the Department and the fact he was wheelchair-bound. **....Willie Dunn, 91 0602 (1992)**

Where the worker's refusal to attend a medical examination is based only upon the worker's unfounded presumption that the physician would be biased, the worker did not demonstrate good cause for the failure to attend the examination. **....Bob Edwards, 90 6072 (1992)**

Where the worker's refusal to attend a medical examination is not based on a challenge to the examining physician's qualifications nor the employer's right to an independent medical evaluation but is based only on the requirement that the worker travel from Chehalis to Portland for the examination, the Department order directing the worker to attend will be affirmed where the worker has made the trip for other medical examinations without complaint, including trips to see his attending physician. **....Larry Nelson, 89 0257 (1990)**

Where a worker has been directed by the Department to appear before a psychiatrist to assist in the administrative adjudication of the claim, the worker is not entitled to have an attorney present and a refusal to attend without an attorney justifies the suspension of benefits. *Tietjen* (13 Wn. App. 86), authorizing the attendance of a party's attorney at a CR 35 examination, is inapplicable to examinations under RCW 51.32.110. **....Elvina Munk, 58,847 (1982)** [dissent]

Retroactive Suspension

The suspension of benefits under the provisions of RCW51.32.110 by the Department or self-insurer, with the Department's approval, may apply to future benefits only. The retroactive suspension of benefits is not permitted. **....Ronnie McCauley, 89 3189 (1991)**

Vocational plan not pursued due to worker's relocation

A worker's move to an area where cost and housing were more affordable is not a "failure to cooperate in vocational rehabilitation" within the meaning of RCW 51.32.110, where the Department apparently did not determine feasibility of a vocational plan in the worker's new location and did not present evidence that such a plan would be impractical. *See Kolano v. Department of Labor & Indus*., 172 Wash. 27, 19 P.2d 113 (1933); *In re Elvina M. Munk*, BIIA Dec., 58,847 (1982). **....Louella Alcorn, 89 2619 (1991)**

THIRD PARTY ACTIONS (RCW 51.24)

Accord and satisfaction

The principles of accord and satisfaction do not apply to third party lien transactions under the industrial insurance act and do not prevent consideration of the factors of RCW 51.24.060 in responding to a worker's request for compromise of its lien, even if a check tendered with the request is presented for payment. **….Penny Brown, 96 2568 (1999)**

Allocation of fault

The statute requires a finding of employer fault before settlement and before the distribution order is issued; without a finding of fault there may be no reduction of the reimbursement amount. In those cases settled after the issuance of *Clark v. Pacificorp*, 118 Wn.2d 167 (1991), there may be no reduction of the Department's reimbursement amount where settlement is entered into before a finding of employer fault by a trier of fact. (Limiting application of *In re Peter N. Hrebeniuk*, BIIA Dec., 91 2764 (1992) to cases settled before filing of *Clark*). **....Michael McQuirk, 93 1355 (1994)** [dissent]

Where a worker asserts that the Department cannot assert its lien against a settlement on the basis that the employer had been found partially at fault by a mediator who helped develop the settlement, the Board noted that the mediator's fault determination is not a determination of fault within the meaning of RCW 4.22.070(1). For that reason, the Board returned the matter to the Department to consider the distribution of recovery after the parties have an opportunity to have fault apportionment hearing at court. **....Peter Hrebeniuk, 91 2764 (1992)** [*Editor's Note:* The Board declined the worker's request to refer this matter to the Superior Court with instructions to determine fault allocation. The Board's decision was appealed to superior court under King County Cause No. 93-2-01774-0.] [Application of principle limited to cases settled before *Clark v. Pacificorp* 1118 Wn.2d 167 (1991) by *In re Michael McQuirk*, BIIA Dec., 93 1355 (1994)]

Assignment of action

Where settlement between worker and uninsured motorist coverage carrier was entered without written approval of self-insured employer as required by RCW 51.24.090, and the employer elects to void the deficiency settlement, the voided settlement does not constitute an automatic assignment of the cause of action to the employer. The employer must petition the court or act in accordance with RCW 51.24.090(2). **....Betty Mathes, 89 3473 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 91-2-00389-2.]

Assignment of interest in distribution of recovery

Where the assignee of a self-insured employer did not inform the Department of its interest in the distribution of third party recovery until well after sixty days following the date of communication of the order to the employer, a later appeal filed by the assignee is not timely, and the Department's distribution order is binding upon the employer and its assignee. **....Calvin Keller, Dec'd., 89 4546 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-01677-6.]

Benefits

The Department's expense in obtaining an ability to work assessment should not be considered in calculating the Department's third party lien because it is not a "benefit" within the meaning of the third party lien statute. **....Marcos Armendariz, 03 11102 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 04-2-19885-2 SEA.]

Compromise of lien

Board's review of the Department's discretionary decision regarding the compromise of its lien pursuant to RCW 51.24.060(3) is limited to determining whether or not the Department has abused its discretion. Department's decision not to compromise its lien because the industrial insurance fund was "not at risk" was not arbitrary and capricious, nor did it constitute an abuse of discretion. **....Johnny Smotherman, 87 0646 (1989)** [*Compare, Hadley v. Department of Labor & Indus*., 116 Wn.2d 897 (1991)] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 89-2-07005.]

Definition of injury

The Department has authority to assert a lien against any third party recovery that involves a condition for which it paid benefits, without regard to whether the condition was caused by the industrial injury. **....Darrin Tharaldson, 04 19948 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 02-2-11626-4.]

Distribution of recovery

In determining costs for which the Department is responsible on a proportionate basis under the provisions of RCW 51.24.060, RCW 4.84.010 regarding costs awarded to a prevailing party does not control. Costs listed in proposed decision and order were appropriately included in the calculation, including photocopies, messenger fees, fax expenses, toll calls and mileage. **....Joann Jones, 90 3578 (1991)**

The excess recovery subject to offset must be calculated by deducting the Department's proportionate share of costs and reasonable attorney's fees from the remaining balance. *Citing In re Maston Mullins*, BIIA Dec., 90 0403 (1992) **....Dick Haag, 90 1236 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 91-2-07862-4.] [Rule reversed by *Davis v. Department of Labor & Indus*., 71 Wn.App. 360 (1993), *reviewed denied*, 123 Wn.2d 1016 (1994)]

The requirement that the Department or self-insurer pay its proportionate share of costs and reasonable attorney's fees includes the directive that the Department or self-insurer reduce the remaining balance subject to offset by the Department's proportionate share of attorney's fees and costs. **....Maston Mullins, Jr., 90 0403 (1991)** [Rule reversed by *Davis v. Department of Labor & Indus*., 71 Wn.App. 360 (1993), *reviewed denied*, 123 Wn.2d 1016 (1994) The Board's decision was appealed to superior court under Pierce County 91-2-06809-2.]

Where a self-insured employer voided deficiency settlement but did not comply with RCW 51.24.090(2) regarding assignment of action, its attorney's fees and costs associated with its pursuing a third party recovery may not be included in calculating any distribution of the recovery. **....Betty Mathes, 89 3473 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 91-2-00389-2.]

Under RCW 51.24.060, the Department must pay a proportionate share of the reasonable attorney's fees and costs "incurred" by the worker in obtaining the third party recovery. The term "incurred" refers to the amount of attorney's fees the worker is actually required to pay to secure the third party recovery, not the fee as originally specified in the contingent fee agreement. **....William Goldstein, 88 2275 (1990)**

The Department was correct in requiring the self-insured employer to pay, at the time of distribution of the third party recovery, its share of attorneys' fees and costs based on benefits paid and payable. Since the amount of the recovery paid to the worker subject to offset against future benefits was less than his entitlement, the employer will benefit from the offset and must, therefore, pay fees and costs on such amount. In evaluating the share of fees and costs, it was also appropriate for the Department to reduce the structured settlement amount to present cash value. **....John Cloyd, 87 0203 (1988)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Chelan County Cause No. 88-2-04533-1.]

Under RCW 51.24.060, the Department must pay a proportionate share of the reasonable attorneys' fees and costs incurred by a worker in obtaining a third party recovery. The numerator of the proportionate share calculation is the actual amount which the Department has, or will, benefit from the recovery. The Department benefits from the recovery to the extent of the balance remaining after deducting fees and costs and the worker's 25 percent share, or the benefits "paid and payable", whichever is the lesser. **....Bruce Wilson, 86 4043 (1987)** [concurrence]

In determining the employer's share of a deficiency third party recovery under the 1983 version of RCW 51.24.060, not only must deductions from the recovery first be made for attorneys' fees and costs and the worker's 25 percent guaranteed share, but the employer must pay a proportionate share of the attorneys' fees and costs as an additional charge against its share of the recovery. The Department's distribution formula is most consistent with the legislative intent of encouraging workers to pursue third party actions and the Board will therefore defer to the administrative interpretation of the statutory distribution scheme. **....Edward Herrin, 85 3448 (1987)** [dissent]**; Steven McGee, 70,119 (1987)** [dissent] [*McGee reversed sub nom Longview Fibre Co. v. Department of Labor & Indus*., 58 Wn. App. 751 (1989) *rev. denied* 114 Wn.2d 1030 (1990)]

Insurance guarantee association recovery

The Department and the self-insured employer have a lien against a worker's recovery made from the Oregon Insurance Guarantee Association (OIGA). The OIGA prohibition against payments of subrogated interests being made to "insurers" only applies to "member insurers." Further, a "self-insured" employer is not an "insurer" within the meaning of the OIGA statute. **....Edwin Stamp, 88 1826 (1989)**

Interest

The Department incorrectly demanded interest payable from the date of recovery in third party recovery distribution order since RCW 51.24.060(7) permits recovery of interest only from the date the lien order becomes final. **....Kevin Ravsten, 88 3859 (1991)** [*Affirmed*, *Ravsten v. Department of Labor & Indus*., 72 Wn. App. 124 (1993) *review denied*, 123 Wn.2d 1030 (1994)]

Multiple beneficiaries

The third party recovery distribution is not altered when monies from third parties are received after a worker's death. Monies received after the death and a spouse's pension are not exempt from offset under the third party distribution scheme. **….Richard Boney, Dec'd., 99 15811, (2001)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 01-2-13652-1.]

It is not improper for the Department to assert its lien for benefits paid to the worker against the entire third party recovery where there is no valid court order or settlement document allocating the damages recovered between multiple individuals who may legally share in the third party recovery. In this case, the Board held that in the absence of such an allocation it could not speculate as to the amount of the recovery which should be attributed to the spouse's claim for loss of consortium. **....Marvin Mills, 89 3090 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 91-2-00363-7.]

Where the Department had approved a third party settlement and received notice of a court hearing to allocate the recovery between the widow and two minor children, yet chose not to appear, it may not thereafter attempt to allocate the third party settlement between the multiple beneficiaries in a manner different from that ordered by the court. **....Dannie Dillard, Dec'd., 89 3691 (1990)**

When a surviving spouse becomes a beneficiary under the Act and becomes entitled to benefits as a result of the worker's death, her benefits cannot be offset under RCW 51.24 unless she has realized a third party recovery (*e.g*., for loss of consortium). Where the Department attributed the entire amount of a prior third party recovery solely to the worker, the only recovery subject to RCW 51.24 is that made by and previously allocated to the injured worker. **....Lawrence Guyette, Dec'd., 89 0832 (1990)**

Recovery limited to injury caused by the third party

When the injury caused by the third party accounts for only a portion of the total injury, the Department and self-insured employer's right to reimbursement for third party recovery is limited to that compensation and benefits that were provided due to the additional injury for which the third party is liable. **…Carma Newton, 00 13742 (2001)**

Reduction of lien due to employer fault (RCW 51.24.060(1)(f))

Where a UIM recovery was made by settlement and there has been no determination of fault by the trier-of-fact as required by RCW 4.22.070, the Department's lien cannot be extinguished under RCW 51.24.060(1)(f). **....James Funston, 88 2863 (1990)**

Settlement for nuisance value

Where a third party action settles for "nuisance value", the recovery is subject to Department's statutory lien. **....Richard See, 90 0943 (1991)** [*Editor's Note:* Because action was for medical malpractice, the Department has a lien arguably only to the extent the malpractice caused further payment of benefits.]

Settlement of action

There is no statutory prohibition against the worker, employer, and Department participating cooperatively by voluntary mutual consent in negotiations with a third party source. Neither the self-insured employer nor the Department have a legal right to pursue third party recovery for their own benefit and/or the worker's benefit without first obtaining an assignment of the action. RCW 51.24.070(1), (2)
....Betty Mathes, 89 3473 (1991) [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 91-2-00389-2.]

Surviving spouse's recovery for loss of consortium

When a surviving spouse becomes a beneficiary under the Act and becomes entitled to benefits as a result of the worker's death, independent of the claim of the deceased worker, the previous recovery made under her third party action for loss of consortium is subject to the offset provisions of RCW 51.24.060. **....Charles Downey, Dec'd., 87 1718 (1989)** [*Reversed, Flanigan v. Department of Labor and Indus*., 123 Wn.2d 418 (1994)]

Underinsured motorist insurance policy owned by employer

The 1986 amendments to RCW 51.24.030 apply to UIM recoveries made after the effective date of the amendments. *Citing O'Rourke v. Department of Labor & Indus*., 57 Wn. App. 374 (1990) *review denied* 115 Wn.2d 1002 (1990)
....James Funston, 88 2863 (1990)

The Department has a lien against a worker's recovery made under his employer's UIM policy, even though the worker was the son of the corporation president, the policy was issued to the corporation and the president individually, and the corporate policy covered the president's family automobiles as well. **....James Funston, 88 2863 (1990)**

The 1986 amendments to RCW 51.24.030 were clarifying amendments, at least insofar as they explicitly stated that the Department or self-insured employer has a lien against a worker's recovery under the employer's underinsured motorist coverage. Thus, the 1986

amendments are retroactive, as a legislative interpretation of the original Act, and the Department or self-insurer has a lien against the worker's recovery under the employer's underinsured motorist policy. **....Dale Goers, 88 0661 (1989)**
[*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-02137-2.]**; Lowell Taylor, 87 3817 (1989)** [*Contra, Department of Labor & Indus. v. Cobb*, 59 Wn. App. 360 (1990) *review denied* 116 Wn.2d 1031 (1991). *Cf. O'Rourke v. Department of Labor & Indus.*, 57 Wn. App. 374 (1990) *review denied* 115 Wn.2d 1002 (1990)]

A worker's recovery under his employer's underinsured motorist insurance policy is not a third party recovery within the meaning of RCW 51.24 and is not subject to the Department's reimbursement lien provided for in RCW 51.24.060(2). **....Michael Morrissey, 66,831 (1985)** [dissent]**; Carl Miller, 68,280 (1985)** [dissent]**; Jill Cobb, 66,449 (1985)** [dissent] [See later statute, RCW 51.24.030(3) as amended 1986 and *In re James Funston*, BIIA Dec., 88 2863 (1990)] [*Cobb affirmed Department of Labor & Indus. v. Cobb*, 59 Wn. App. 360 (1990) *review denied* 116 Wn.2d 1031 (1991)]

TIME LOSS COMPENSATION (RCW 51.32.090)

(See also LOSS OF EARNING POWER)

Attending physician's recommendation against return to work

A worker who refrains from engaging in gainful employment on the advice of his attending physician is entitled to time loss compensation even though the attending physician's advice is later determined to be in error. **....Charles Hindman, 32,851 (1970)** [dissent]

Certification by vocational rehabilitation counselor

A vocational rehabilitation counselor's certification of a worker's inability to work will support payment of time loss compensation under RCW 51.32.090.
....David Potts, 88 3822 (1989)

Certification for available light work (RCW 51.32.090(4))

RCW 51.32.090(4) establishes an odd-lot doctrine for temporary total disability like that developed through case law for permanent total disability. If a worker is unable to perform light or sedentary work of a general nature, then the burden shifts to the Department or the self-insured employer to prove that there is some special type of work which the worker can perform and which is actually available.
....Larry McBride, 88 0882 (1989)

The employer cannot benefit from the provisions of RCW 51.32.090(4) unless the attending physician certifies the worker's ability to do available light work. A forensic examiner's certification will not suffice. **....O. C. Thompson, 60,203 (1983)**

The employer cannot benefit from the provisions of RCW 51.32.090(4) where it did not provide the attending physician with a statement describing the available work in terms that would enable him to relate the physical activities of the job to the worker's disability and where the attending physician did not communicate his release to the worker.
....Carol Rose, 49,894 (1978)

Eligibility

A worker may be eligible for time-loss compensation benefits or loss of earning power benefits from the date of manifestation of an occupational disease. **....Rick Yost, Sr., 01 24199 (2003)**

Eligibility where capable of performing light work

A permanent long time worker temporarily unable to perform his regular job while undergoing treatment, but capable of performing some type of light duty employment, was not precluded from receiving time loss compensation where it was anticipated that he would return to his prior job and the employer had not offered an alternative job within the worker's capabilities. **....Larry Washington, 65,450 (1984)** [dissent]

Eligibility while attending medical evaluation

A physical capacities evaluation conducted relative to a medical condition is considered a medical evaluation for purposes of RCW 51.32.110, which allows for reimbursement of lost wages while attending a medical evaluation. **....Linda Robinovitch, 01 24949 (2003)**

Eligibility while undergoing vocational rehabilitation (RCW 51.32.095(3))

When time loss compensation benefits are ordered under RCW 51.32.095(3) as part of a vocational rehabilitation plan, the standard of review is abuse of discretion. **….Michael Pinger, 97 2210 (1998)** [*Editor's Note*: The Board's decision was appealed to superior court under Grays harbor County Cause No. 98-2-01511-6.]

A worker cannot, as a matter of law, receive time loss compensation benefits under RCW 51.32.095(3) unless he is undergoing a formal program of vocational rehabilitation. **....David Potts, 88 3822 (1989)**

Entitlement beyond date condition becomes fixed

A worker's condition is not legally fixed until the Department first issues an order which classifies the worker's condition as fixed and permanent. No time loss compensation or loss of earning power payments are payable beyond that date unless the medical evidence establishes that the worker's condition was not fixed at that time (following *In re Douglas Weston*, BIIA Dec., 86 1645 (1987)). **....Maria Chavez, 87 0640 (1988)**

Intermittent employment

General laboring work on construction-type projects for 40 to 60 hours a week which is generally available on a continuous basis is full time employment rather than part-time or intermittent. **....Deborah Guaragna (Williams), 90 4246 (1992)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 92-2-01080-5.]

No presumption of continued eligibility

Determinations that the worker was temporarily totally disabled for periods immediately prior and subsequent to the period for which time loss compensation is claimed create no presumption that the worker was temporarily totally disabled during the interim period. **....Mark Billings, 70,883 (1986)**

Orders void *ab initio*

Department orders setting the wage without inclusion of the value of worker's health care benefits are not void *ab initio*. Time-loss compensation orders entered with personal and subject matter jurisdiction are not void. To the extent that prior Board significant decisions, *In re Dennis Roberts,* BIIA Dec., 88 0073 (1989) and *In re Rod Carew*, BIIA Dec., 87 3313 (1989), do not reflect the law post *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994), they are overruled.
....Clement McLaughlin, 02 18933 (2003) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 03-2-41325-9SEA.]

Time loss compensation orders based on a legally incorrect computation method are void *ab initio* and a party may challenge the correctness of the amount of time loss compensation even though the statutory time limitation for filing an appeal or request for reconsideration has passed. **....Rod Carew, 87 3313 (1989); Dennis Roberts, 88 0073 (1989)** [*Editor's Note:* Consider impact of *Marley v. Department of Labor & Indus*., 125 Wn.2d 533 (1994)] (Overruled by *In re Clement McLaughlin*, BIIA Dec., 02 18933 (2003))

Provisional time loss compensation (RCW 51.32.190(3) and RCW 51.32.210)

That the Department may recoup provisional time-loss compensation benefits if a claim is ultimately rejected does not extinguish its responsibility to pay provisional time-loss compensation for any period in which the worker is certified as unable to work prior to a determination of claim allowance. **....Kirtley Gardiner, 05 12349 (2006)**

Orders of the Department paying provisional time loss compensation, entered prior to the issuance of an order rejecting or allowing the claim on its merits, are not final orders of the Department under RCW 51.52.050 and .060. Until the Department issues a determinative order either rejecting or allowing the claim, the payment of provisional time loss compensation cannot be challenged by an appeal to the Board.
....Ruth Logan, 89 0189 (1989)

Provisional time loss compensation must be paid despite the subsequent rejection of the claim. **....Melvin Oshiro, 67,112 (1985)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 85-2-068807]**; Lynnette Murray (II), 42,296** [dissent] **(1974)** [See later statutory amendment of RCW 51.32.240(2) allowing recovery of provisional time loss overpayment where claim subsequently rejected.]

Provisional time loss compensation was not payable for the period prior to the filing of the claim where the worker delayed filing the accident report until after he had returned to work, the employer contested the claim promptly, and the claim was ultimately rejected. **....Jeff Howe, 67,308 (1985)**

Provisional time loss compensation is payable until the Department issues a determinative order of allowance or rejection of the claim. **....Sandra Lucille Walster (I), 43,049, (10/73)** [dissent]**; Florence Irene Reid, 43,052 (1973)** [dissent]

Recovery of overpayment of benefits (RCW 51.32.240(1)) - See **DEPARTMENT** Authority to recoup overpayment of benefits

Res judicata – See **RES JUDICATA** Wages at time of injury

If the Department issues two orders determining the worker's wage in order to calculate time-loss compensation benefits, the last order issued that becomes final is the determinative order setting the worker's wage. **….Stephen Everhart, 09 14820 (2010)**

Scope of review – See **SCOPE OF REVIEW** Time loss compensation

Seasonal employment – See also Wages – Intermittent/seasonal, full time or other usual wages paid others

A worker, whose work transcends the seasons and is not defined by the seasons, cannot have such work classified as exclusively seasonal in nature. **....Alfredo Lomeli, 90 4156 (1992)**

The term "seasonal" equates to the actual seasons of the year. Thus, a worker's employment which is based on a 180-day school year cannot be classified as exclusively seasonal in nature. **....Mary Ann Minturn, 90 3572 (1992)** [dissent] [*Reversed, sub nom School District No. 401 v. Mary Ann Minturn,* 83 Wn. App 1 (1996)]

Simultaneous loss of earning power and time-loss compensation

A worker who suffers an industrial injury causing a loss of earning power and subsequently suffers another industrial injury causing temporary total disability is not precluded from simultaneously receiving loss of earning power compensation and time loss compensation. **....Lloyd Larson, 86 0479 (1988)**

Sporadic employability

When a worker is undergoing active treatment, making attempts to return to work with the employer at the time of injury and experiencing exacerbation's of his condition which require him to miss work, that worker is not capable of reasonably continuous gainful employment. The law does not require such a worker to seek temporary employment in the general labor market during times of temporary improvement in his condition. **....Kevin Francis, 89 0483 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Stevens County Cause No. 90-2-00333-5.]

Termination from modified position

An injured worker who is terminated from a modified position for cause is not barred from receiving time-loss compensation benefits if the worker is otherwise entitled to the benefits. **....Jennifer Soesbe, 02 19030 (2003)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 03-2-02077-7.]

When a worker is terminated from a modified position for disciplinary reasons, it is not necessary that the self-insured employer reinstate time-loss compensation if the disciplinary termination was administered for reasons unrelated to the industrial injury and the discipline would have been administered to other employees in similar circumstances. **… .Chad Thomas, 00 10091 (2001)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 01-2-02478-9.]

Wage at time of injury – See **RES JUDICATA** Wages at time of injury

Wage continuation precludes time loss compensation (RCW 51.32.090(6))

A worker who is employed for nine months out of the year but has salary pro-rated over a 12-month period is not receiving continuation of wages during the three-month interim. The worker is entitled to time-loss compensation if unable to work during the three-month interim. **....Frances Wareing, 02 11829 (2003)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 03-2-01526-9.]

Payment of shared leave benefits under RCW 41.04.665 does not constitute wage continuation and therefore time loss compensation benefits are also payable. *Citing In re Frank Serviss*, BIIA Dec., 57,651 (1981). **….Carla White, 96 3129 (1998)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Pacific County Cause No. 98-2-00255-9, Employer; Pacific County Cause No. 98-2-00268-1, Department.][*Reversed in part. Affirmed as to status of shared leave benefits. South Bend School Dist. No. 18 v. White* 106 Wn. App. 309 (2001).]

A poll worker employed by the county for one day, two or three times per year, was considered to have a monthly wage at the time of her injury equal to $59.95 -- her daily rate of pay. The employer's continued payment of such wages precludes payment of time loss compensation. **....Pauline Sandstrom, 85 2110 (1987)**

The receipt of holiday pay at the regular salary rate does not preclude the worker from receiving time loss compensation for the same period of time**.** **....Harold MacIsaac, 66,169 (1985)** [dissent] [*But see, South Bend School Dist. No. 18 v. White* 106 Wn. App. 309 (2001).]

Sick leave paid at the regular salary rate, which is not paid as a continuation of "wages," does not preclude the worker from receiving time loss compensation for the same period.

The employer is not prevented, however, from establishing a policy for recouping sick leave paid during a period of temporary total disability. **....Frank Serviss, 57,651 (1981)** [dissent] [*Holding rejected, South Bend School Dist. No. 18 v. White* 106 Wn. App. 309 (2001).]

Sick leave pay received by a city employee pursuant to a municipal ordinance which provides that a person in sick leave status shall receive his "regular salary," precludes the concurrent payment of time loss compensation. **....H. B. Whiteside, 17,144 (1962)**

Wages (RCW 51.08.178) - Compensation

The cost of an employer's contribution for a worker's healthcare benefit is included in the worker's wages; it is irrelevant whether the worker had worked sufficient time to be entitled to receive the healthcare benefits themselves. **....William Granger, 02 17611 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under Skagit County Cause No. 04-2-00236-5; Court of Appeals 10/27/04.]

Employer contributions pursuant to a union contract, earmarked for health and welfare benefits, need not be included in the wage calculation so long as the benefit continues. **....Fred Jones, 02 11439 (2003)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 03-2-04618-7.]

The payment of monies to various trusts, pursuant to a union contract, must be analyzed in terms of whether the payment is "in-kind compensation," critical to health and survival, consistent with the holding in *Cockle v. Department of Labor & Indus.,* 142 Wn.2d 801 (2001). **....Fred Jones, 02 11439 (2003)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 03-2-04618-7.]

Pension benefit contributions made by an employer are not critical to the workers health and survival. Therefore, those contributions should not be included in the wage calculation because they are not a core, non-fringe benefit, such as food, shelter, fuel and health care critical to protecting the worker's basic health and survival. *Citing In re Cockle v. Department of Labor and Indus.*, 142 Wn.2d 810 (2001). **….Ronald Tucker, 00 11573 (2001)** [*Editor's Note*: The Board's decision was appealed to superior court under Benton County Cause No. 01-2-01239-5.]

Life insurance contributions paid by an employer are not critical to the worker's health and survival. Therefore, those contributions should not be included in the wage calculation because they are not a core, non-fringe benefit, such as food, shelter, fuel and health care critical to protecting the worker's basic health and survival. *Citing In re Cockle v. Department of Labor and Indus.*, 142 Wn.2d 810 (2001). **…Douglas Jackson, 99 21831 (2001)**

While working for one employer the worker was paid two hourly rates, depending on the day of the week worked. The wages at the time of the injury should be calculated as if the worker held jobs with two different employers at two different wages. A worker who averaged more than 36 hours of work a week is not essentially part-time within the meaning of RCW 51.08.178(2). The wage should be calculated using RCW 51.08.178(1). **….Kay Shearer, 96 3384 (1998)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 98-2-15876-OKNT.]

The worker was injured in the course of his employment as an owner of a convenience store. He did not formally collect wages but took "draws" out of the store's monthly

gross profit. His wages could not be fairly determined in this circumstance. As a result, time-loss calculation should be determined pursuant to RCW 51.08.178(4), using the usual wage paid other employees in like or similar occupations. **….Jerry Uhri, 93 6908 (1995)** [*Editor's Note*: The Board's decision was appealed to superior court under Cowlitz County Cause No. 95-2-00555-2.]

The daily service fee paid to a juror is included as "wages" for purposes of computing time loss compensation, but mileage fees are not since they are no more than an incidental travel reimbursement. **....Bjorn Viking Bolin (II), 91 0873 (1992)** [*Editor's Note:* The Board's underlying determination that a juror was not a covered worker under the Act was reversed in *Bolin v. Kitsap County*, 114 Wn.2d 70 (1990).]

Per diem paid to a worker while in travel status is included as "wages" for purposes of computing time loss compensation. **....James Young, 89 3233 (1991)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-02377-2.](*Overruled by implication, In re Cockle v Department of Labor & Indus*., 142 Wn.2d 801 (2001))

The 1988 amendments to RCW 51.08.178, which permit the averaging of wages to determine a worker's time loss rate, do not apply to a claim for an injury which occurred prior to the time the amendments took effect. **....Diana Stephens, 89 0717 (1990)**

RCW 51.08.178 requires the Department to base the calculation of time loss compensation on the worker's monthly wage at the time of injury. The pre-1988 statute does not permit the averaging of wages over a several month period in order to determine the "monthly wage." **....Ubaldo Antunez, 88 1852 (1989); Rod Carew, 87 3313 (1989); Dennis Roberts, 88 0073 (1989); Jeanetta Stepp, 87 2734 (1989)**

The only averaging permitted by RCW 51.08.178 (before 1988 amendments) is in determining the number of hours per day or days per week the worker was "normally employed" at the time of injury. **....Ubaldo Antunez, 88 1852 (1989); Jeanetta Stepp, 87 2734 (1989)**

RCW 51.08.178 does not allow the Department to calculate a seasonal worker's rate of time loss compensation on the basis of the worker's "average monthly wage" for the year prior to the date the injury occurred. The statute requires that the time-loss compensation rate be based upon a monthly wage, which is the product of the daily wage at the time of the injury and the statutory multiplier associated with the number of days per week the worker is normally employed. The only "averaging" possibly permitted by statute would relate to the number of hours per day or days per week which the worker was "normally" employed. **....Teresa Johnson, 85 3229 (1987)** [special concurrence] [See later statutory amendment of RCW 51.08.178, Laws of 1988, ch. 161, § 12, p. 699]

Meals supplied by the employer are "wages" for purposes of computing the rate of time loss compensation. **....Lisa Soden, 85 2993 (1987)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 87-2-05759-3.]

The cost of a prisoner's room and board does not constitute "wages" for purposes of computing time loss compensation. **....Jeffrey Rose, 69,983 (1986)** [*Affirmed, Rose v. Department of Labor & Indus*., 57 Wn. App. 751 (1990) *review denied* 115 Wn.2d 1010 (1990)]

Averaging hours worked per day pursuant to RCW 51.08.178(1) should only be used in limited circumstances. Minor variations in hours worked should be considered self-correcting rather than

representative of a change in full-time status. Averaging is the exception rather than the norm when establishing the number of hours worked. **….Maggie Stedman, 09 22981 (2010)**

Wages – Intermittent/seasonal, full time or other usual wages paid others

The worker did not have a recent work history that allowed for calculation of a fair and reasonable wage under RCW 51.08.178(2). Calculation under subsection (2) would result in a wage substantially less than the actual wages. Calculation under subsection (1) would result in a wage calculation significantly higher than the wage the worker would have earned had the worker not been injured. Under the circumstances, subsection (4) should be applied to determine the wage based on the usual wages paid others engaged in similar occupations. **....Janet Papson, 01 15138 (2003)**

Where the worker had a work history and pattern of employment demonstrating an intermittent attachment to the labor market and had been hired as a temporary but full-time worker the employment is essentially that of a defined duration and matches the definition of "intermittent employment" contained in RCW 51.08.178(2). *Citing School Dist. No. 401 v. Minturn,* 83 Wn. App. 1 (1996) and *Double D Hop Ranch v. Sanchez,* 82 Wn. App. 350 (1996). **….Yong Gable, 95 4228 (1997)** [dissent] [*Editor's Note:* The Supreme Court reversed *Double D Hop Ranch v. Sanchez* on the interpretation of "seasonal" worker. *Double D Hop Ranch v. Sanchez,* 133 Wn.2d 793 (1997). The Board's decision was appealed to superior court under Spokane County Cause No. 97-2-02309-7.]

Where a worker is characterized as "temporary" but was on call every day of employment and worked a substantial number of hours and drove many miles for the employer, the worker was a full-time employee and should be paid time-loss compensation accordingly. **....Lucian Saltz, 92 4309 (1993)**

Factors to determine whether a worker is a part-time or intermittent worker within the meaning of RCW 51.08.178(2) include the type of work performed, the worker's relationship to the work as evidenced by the employment situation at the time of injury and the parties' intent. Thus, a worker who engaged in general laboring work for a temporary services agency and whose work history was essentially full time and who intended to continue full time employment is a full time employee entitled to wage calculation under RCW 51.08.178(1). **....Deborah Guaragna (Williams), 90 4246 (1992)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 92-2-01080-5.]

Factors to determine whether a worker is a seasonal worker within the meaning of RCW 51.08.178(2) include the type of work performed, the worker's relationship to the work as evidenced by the employment situation at the time of injury and the parties' intent. Thus, a worker who engaged in general farm labor and whose work history was essentially full time and who intended to continue full time employment is a full time employee entitled to wage calculation under RCW 51.08.178(1). **....Alfredo Lomeli, 90 4156 (1992)**

Factors to determine whether a worker is a part-time, intermittent or seasonal worker within the meaning of RCW 51.08.178(2) include the type of work performed, the worker's relationship to the work as evidenced by the employment situation at the time of injury and the parties' intent. Thus, a worker who operated a school bus 5.5 hours per day, routinely worked extra hours for other school activities and whose 180-day contract assured renewal for each succeeding school year is a full time employee entitled to wage calculation under RCW 51.08.178(1). **....Mary Ann Minturn, 90 3572 (1992)** [dissent] [*Reversed, sub nom School District No. 401 v. Mary Ann Minturn,* 83 Wn. App 1 (1996)]

Wages - RCW 51.08.178(1), (2), or (4)

Averaging hours worked per day pursuant to RCW 51.08.178(1) should only be used in limited circumstances. Minor variations in hours worked should be considered self-correcting rather than representative of a change in full-time status. Averaging is the exception rather than the norm when establishing the number of hours worked.
….Maggie Stedman, 09 22981 (2010)
[Editor's Note: The Board's decision was appealed to superior court under Snohomish County Cause No.10-2-00039-6.]

An intermittent worker, as contemplated by RCW 51.08.178(2), engaged in duties on the date of manifestation which were clearly related to contracted, but not commenced, full-time employment should have wages determined under RCW 51.08.178(4) when using subsection (2) would result in a wage that does not reflect lost earning capacity.
….Wendy Zimmerman, 08 19330 (2009)

In making a determination whether wages should be paid under RCW 51.08.178(1) or (2), the focus must be on the worker's relationship to employment, not merely the worker's relationship to the employer. A school teacher who works for the school district under a nine-month contract and continues employment as an educator during the summer has established a relationship to employment that requires wages be calculated pursuant to subsection (1). **....Glenda Frost-Kaczynski, 05 15420 (2006)**
[*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 06-2-01542-0.]

TIMELINESS

(See COMMUNICATION OF DEPARTMENT ORDER, NOTICE OF APPEAL, PROTEST AND REQUEST FOR RECONSIDERATION, TIMELINESS OF APPLICATION TO REOPEN CLAIM and TIMELINESS OF CLAIM)

TIMELINESS OF APPLICATION TO REOPEN CLAIM (RCW 51.32.160)

Applicability of 1988 amendments

Under the 1988 amendments to RCW 51.32.160, a claim may be reopened at any time for further treatment so long as worsening of condition has been shown. The seven year time limitation does not apply to a reopening for that limited purpose.
....Mike Streubel, 89 4867 (1990) [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 91-2-10973-2.]

Under the 1988 amendments to RCW 51.32.160, the time limitation is removed for applying to reopen a claim to obtain additional medical services.
....Marven Sandven, 89 3338 (1990)

Calculation of time

The seven year period for filing an application to reopen a claim begins to run when the Department order establishing or terminating compensation becomes a complete and final adjudication. Where no appeal was taken from the original order closing the claim, the statutory period for applying to reopen begins 60 days from the date the order was communicated to the worker. **....Daniel Bauer, 47,841 (1977)**

Issue of timeliness of application may be raised for first time on appeal

The Department may raise the statute of limitations defense to the filing of an application to reopen a claim even though the order on appeal did not deny the application on timeliness grounds. *Citing Hutchins v. Department of Labor & Indus*., 44 Wn. App. 571 *review denied* 107 Wn.2d 1010 (1986) **....Mike Streubel, 89 4867 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 91-2-10973-2.]

TIMELINESS OF CLAIM (RCW 51.28.050; RCW 51.28.055)

(See also APPLICATION TO REOPEN CLAIM, APPLICATION FOR BENEFITS and RETROACTIVITY OF STATUTORY AMENDMENTS)

Calculation of time

The one-year time limitation for filing claims under RCW 51.28.050 begins to run on the day of injury, not the day after. **....Gwen Carey, 03 13790 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 05-2-08212-5.]

Child's claim for survivors' benefits

Minority does not toll the time within which a child's application for survivor's benefits under the Industrial Insurance Act must be filed. A claim filed more than a year beyond the day the rights of the beneficiaries accrued is not valid or enforceable and the Board is without authority to excuse, on equitable grounds, an untimely application for benefits. **....Isaias Chavez, Dec'd., 85 2867 (1987)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Franklin County Cause No.87-2-50284-1.]

Crime victims' compensation

Minority tolls the time period for filing a claim for crime victims' compensation. **....Ben Ramahlo, 85 C025 (1987)**

Filing

Where there has been no determination by a court of final jurisdiction applying equitable estoppel to excuse an untimely filing under RCW 51.28.050, the Board will not apply the doctrine to a situation where the worker alleges that the Department employees improperly informed him of the requirements for filing an application for benefits. The Board noted that the facts failed to establish that the inaccurate statements caused injury to the worker, concluding that the failure to timely apply for benefits was due to the worker's own mistake. **....James Neff, 92 2782 (1994)**

[*Editor's Note*: The Board's decision was appealed to superior court under Whatcom County Cause No. 94-2-01446-0.]

When the last day for filing a claim falls on a Saturday or Sunday, the claimant has until the end of the next day which is neither a Saturday, Sunday or holiday to file the claim (WAC 296-08-070). **....Freda King, 69,935 (1985)** [Editor's Note: to the extent it is inconsistent, *King* was overruled by *In re Gwen Carly*, BIIA Dec., 03 13790 (2005).]

A written report of accident completed at the hospital with the assumption that it would be mailed to the Department could not be considered a timely claim for benefits where there was no evidence that the report was mailed to or received by the Department within one year of the date of injury. The hospital was not an agent of the Department in dealing with the worker who had the sole responsibility for timely filing his claim. **....Carl Kinder, 44,967 (1976)** [dissent]

A claim is not filed with the Department until it is received by the Department. An accident report mailed within one year of the industrial injury but received by the Department more than one year after the industrial injury is untimely and the claim must be rejected. **....Stan Hall, 36,628 (1971)**
[Editor's Note: to the extent it is inconsistent, *Hall* was overruled by *In re Gwen Carly*, BIIA Dec., 03 13790 (2005).]

Hearing loss

The two-year limitation period for filing a compensable hearing loss claim begins to run on the last day of injurious exposure, not the day after. **….James Scales, 09 10566 (2009)**

Occupational disease [after 1984 amendment to RCW 51.28.055]

Because the earliest date that events which could have led to the filing of a claim occurred in December 1984, when the worker was told that she had a non-A/B hepatitis but was not provided a definitive diagnosis because type C had yet to be identified by medical science, 1984 amendments to RCW 51.28.055 apply. **....Sharon Baxter 92 5897 (1994)**

Occupational disease [prior to 1984 amendment to RCW 51.28.055]

Compensable disability

The time limit for filing an occupational disease claim does not begin to run until the worker has a compensable disability; that is, until he is temporarily totally disabled, permanently partially disabled or permanently totally disabled. **....Leo Lapierre, 69,044 (1986)**

No cause of action for an occupational disease accrues until the worker receives notification from a physician that he has an occupational disease resulting in a compensable disability. A worker who was able to continue working without impairment did not have a compensable disability. The statute of limitations did not begin to run until the worker's condition rendered him temporarily totally disabled, despite the fact that he was earlier advised by his doctor that he had an occupational disease. **....Robert Kutzer, 44,305 (1976)** [dissent]

Divisible claims

The failure to file a timely claim for hearing loss does not necessarily extinguish the right to file a claim for hearing loss which develops after the date a physician notified the worker that he was suffering from an occupational disease. The burden is on the worker, however, to establish that the additional hearing loss was caused by occupational exposure occurring after the date of such notification. **....Herbert Lovell, 69,823 (1986)**

Although a worker failed to file a timely claim for carpal tunnel syndrome in his right hand, his claim for carpal tunnel syndrome in his left hand was timely since the condition in that extremity only became disabling within one year of the date the claim was filed. **....Richard Olds, 61,534 (1983)** [dissent]

Although a worker's claim for hearing loss was not filed within one year of the date he was first advised by a physician that he suffered from an occupational disease, his claim for benefits for the additional hearing loss incurred after that date is not time barred. **....Eugene Burrill, 47,766 (1977)** [dissent]

Notification by physician

The one-year limitation period for filing a claim for an occupational disease does not commence until the worker is advised by a physician that the worker's employment is the cause of the disease. A statement to the worker that work is bad for his condition is insufficient, as that which is or may be harmful to a condition is not, ipso facto, its cause. **....Radford Angell, 21,334 (1965)**

Oral reports in self-insured claims

The Board's decisions in *Coston* and *Craft* are overruled to the extent they hold an oral report of injury, made to a self-insured employer within one year of injury, is sufficient to constitute a timely claim. **....Eugene Whalen, 89 0631 (1990)** [dissent]

A worker's oral report of injury within one year of its occurrence to his immediate supervisor, followed by the employer's knowledge of the worker's absence, constituted sufficient notice of a claim to the self-insured employer, imposing a duty on the self-insured employer under RCW 51.28.025 to make further inquiry of the worker and to report the injury to the Department. Although a written application for benefits was not filed until after the one year period for filing a claim had elapsed, the claim was considered timely. **....Del Coston, 58,765 (1983)** [dissent] **[***Overruled, In re Eugene Whalen*, BIIA Dec., 89 0631 (1990)]

When an employer is self-insured, a worker's oral report of injury to his immediate supervisor and to the company nurse within one year of the injury satisfies the requirements of RCW 51.28.020 and RCW 51.28.050 for filing a timely claim. **....Russell Craft, 54,919 (1980)** [dissent] [*Overruled, In re Eugene Whalen*, BIIA Dec., 89 0631 (1990)]

Physician's certification (RCW 51.28.020)

The one year limitation for filing an industrial injury claim (RCW 51.28.050) refers only to the worker's application for benefits, not the physician's certification. The failure to file the certificate of the physician within one year of the alleged injury does not time-bar the claim. **....Eugene Whalen, 89 0631 (1990)** [dissent]

Survivors' benefits

The surviving children's claim for benefits was timely even though filed more than one year after the worker's death since a claim for benefits for the children of a subsequent marriage had been filed within the one year period. The second application for benefits should be treated as an application for rearrangement of compensation based on a change of circumstances pursuant to RCW 51.28.040, and the Department therefore retained continuing jurisdiction under that statute to include the additional surviving children. **....Jackie Davis, Jr., Dec'd., 66,123 (1985)**

Survivor's benefits where worker dies of occupational disease

If the worker was never provided with the written notification mandated by RCW 51.28.055 (as amended in 1984), the beneficiary's claim for survivor's benefits is not extinguished by the mere passage of two years from the date of the worker's death. **....Christopher Aalmo, Dec'd., 87 4382 (1989)** [dissent] [*Affirmed Department of Labor & Indus. v. Aalmo*, 117 Wn.2d 222 (1991)]

TIMELINESS OF NOTICE OF APPEAL

(See NOTICE OF APPEAL and COMMUNICATION OF DEPARTMENT ORDER)

TREATMENT

After claim closure

RCW 51.36.010 permits the Director to exercise discretion to provide continued treatment in circumstances other than claims closed with a total permanent disability determination. The decision of *In re David Malmberg*, Dckt. No. 86 1326 (November 12, 1987), to the extent that the Board concluded that the statute only applied in circumstances of total permanent disability, is overruled. **....Debra Reichlin, 00 15943 (2003)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 01-2-00489-8.]

Aggravation of pre-existing condition

A worker need not prove lighting up of a condition in order to be entitled to treatment. A worker is entitled to treatment if a pre-existing condition was aggravated by the industrial injury or occupational disease. **....Aaron Libby, 04 20487 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 05-2-39669-5 SEA.]

Failure to obtain prior authorization

A self-insured employer may be required to pay for surgery even if the provider did not obtain prior authorization if the procedure was medically necessary and proper. *Citing Boise Cascade v. Huizar*, 76 Wn. App. 676 (1994). **….David Harrington, 97 A033 (1999)**

The Board will consider a worker's post-surgical improvement in determining whether treatment originally denied by Department or self-insured employer was reasonable and necessary, despite the surgeon's failure to obtain prior authorization or second opinion. **....Zbiegniew Krawiec 90 2281 (1991)** [dissent] [*Compare In re Iva Labella*, BIIA Dec., 89 3586 (1991)].

The nature of the treatment pursued and the reasonableness of the worker's doing so will be considered in determining whether the worker is entitled to benefits. Where worker did not objectively demonstrate that surgery was proper and necessary for treatment of her industrial injury and knew surgery was not authorized, and that benefits had been suspended, Department properly denied responsibility for treatment benefits as well as denying award for time loss compensation and/or permanent partial disability award arising from the surgery. **....Iva Labella, 89 3586 (1991)** [*Cf. In re Arvid Anderson*, BIIA Dec., 65,170 (1986). *Compare In re Zbiegniew Krawiec*, BIIA Dec., 90 2281 (1991) The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-04329-3.]

Fixity of condition

A worker's refusal to undergo recommended treatment may result in a finding that the conditions are medically fixed. **….Smajo Mesan, 08 22054 (2010)**
[Editor's Note: The Board's decision was appealed to superior court under Benton County Cause No. 10-2-03101-1.

Whether a claim should remain open for further treatment depends upon the character of the industrially related condition and disability and the expected effect of particular treatment. A claim is ready for closure when the condition and disability are best characterized as essentially permanent, fixed and stable--that is, when with or without treatment, the condition is enduring, not temporary or transient and no fundamental or marked change can be expected. **....Lyle Rilling, 88 4865 (1990)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 90-2-00834-3.]

Hearing aids

In order to require provision of hearing aids without regard to the date treatment was concluded or the claim closed, the ongoing responsibility to provide hearing aids must be stated in an order entered at, or prior to, closing. **....Andrew Carey, 04 18928 (2005)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Pacific County Cause No. 05-2-00377-6.]

Proper and necessary medical and surgical services (RCW 51.36.010)

Medical opinions that establish that a worker's condition would rapidly deteriorate and be life-threatening without further treatment provide a sufficient basis to conclude that the further treatment is proper and necessary. **....Freda Hicks, 01 14838 (2004)**

When the authorization of a specific form of treatment is at issue, whether that treatment modality constitutes "proper and necessary medical and surgical services" depends on whether it meets the definition of "medically necessary" contained within WAC 296-20-

01002. Unless the treatment modality falls within a category of treatment that is specifically authorized or rejected in all cases by regulations within Chapters 296-20, 296-21 or 296-23, WAC, each individual request for authorization must be examined to see if under the circumstances of the case, it meets the regulatory definition of "medically necessary." Medically necessary treatment may be curative, diagnostic or rehabilitative. So-called "palliative" treatment may still be authorized if it meets the definition of "medically necessary" and is not excluded by other regulatory provisions. Medical treatment that is considered controversial, obsolete, experimental or investigational may also be authorized if its proponent can overcome the presumption that it is not "medically necessary." **….Susan Pleas, 96 7931 (1998)** [dissent]

The Board will consider a worker's post-surgical improvement in determining whether treatment originally denied by the Department or self-insured employer was reasonable and necessary, despite the surgeon's failure to obtain prior authorization or second opinion. **....Zbiegniew Krawiec 90 2281 (1991)** [dissent] [*Compare In re Iva Labella,* BIIA Dec., 89 3586 (1991)]

The nature of the treatment pursued and the reasonableness of the worker's doing so will be considered in determining whether the worker is entitled to benefits. Where worker knew surgery was not authorized, and that benefits had been suspended, Department properly denied responsibility for treatment benefits as well as denying award for time - loss compensation and/or permanent partial disability award arising from the surgery. **....Iva Labella, 89 3586 (1991)** [*Cf. In re Arvid Anderson,* BIIA Dec., 65,170 (1986). *Compare In re Zbiegniew Krawiec,* BIIA Dec., 90 2281 (1991). The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-04329-3.**]**

Recoupment of medical expenses – See **DEPARTMENT** Authority to recoup overpayment of benefits

Spinal column stimulator

Although implantation of spinal column stimulator is "controversial" treatment per medical aid rules, such treatment may be authorized if the treatment is rehabilitative and reflective of accepted standards of good practice, thereby satisfying the requirements that it be "medically necessary" treatment within the meaning of WAC 296-20-01002 and "proper and necessary medical and surgical services" within the meaning of RCW 51.36.010. **….Susan Pleas, 96 7931 (1998)** [dissent]

Subsequent condition impairing recovery

WAC 296-20-055 allows the Department to authorize treatment for a pre-existing condition that retards recovery from the effects of an industrial injury, but does not allow the Department to authorize treatment for unrelated conditions developed subsequent to the industrial injury. **....Kris Ayers, 04 10250 (2005)**

UNUSUAL EXERTION

(See INJURY and HEART ATTACK)

VOCATIONAL REHABILITATION

Abuse of discretion

Where the record consists of information substantially different than that before the Director, the industrial appeals judge's disagreement with the determination does not establish that the Director's determination was arbitrary and capricious and thus an abuse of discretion where Director relied upon evaluations and recommendations of qualified, certified vocational rehabilitation counselor, in light of RCW51.32.095. **....Mary Spencer, 90 0264 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 91-2-00629-2.]

Burden of proof

To establish that the Director's decision was arbitrary or capricious and thus an abuse of discretion, the appealing party must put forward the same or at least substantially similar factual information as was before the Director. *Citing Ritter v. Board of Commissioners*, 96 Wn.2d 503, 637 P.2d 940 (1981). **....Mary Spencer, 90 0264 (1991)**

Cooperation of worker relevant

In determining whether a worker is likely to benefit from vocational rehabilitation the cooperation of the worker is relevant. Worker who continually fails to appear and cooperate in evaluations designed to assess his physical limitations and need for vocational rehabilitation services is not likely to benefit from such services. **....Todd Eicher, 88 4477 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 90-2-01106-4.]

Eligibility for time loss compensation distinguished (RCW 51.32.090)

When time loss compensation benefits are ordered under RCW 51.32.095(3) as part of a vocational rehabilitation plan, the standard of review is abuse of discretion. **….Michael Pinger, 97 2210 (1998) [***Editor's Note*: The Board's decision was appealed to superior court under Grays Harbor County Cause No. 98-01511-6.]

Review of Director's decision that a worker is "employable," and therefore not eligible for vocational rehabilitation services, is limited to whether or not the discretionary authority of RCW 51.32.095 has been abused. However, review of a determination that a worker is "employable," and therefore not eligible for time loss compensation under RCW 51.32.090, is de novo, subject only to a "preponderance of the evidence" standard of review. **....Christine Palodichuk, 90 0252 (1990)**

Option 2 benefits under RCW 51.32.099

Selection of Option 2 vocational benefits under RCW 51.32.099 does not preclude a worker from appealing the closing order and proving entitlement to permanent total disability benefits. Selection of Option 2 vocational benefits does not constitute a compromise and release of other benefits. **….Bill Ackley, 09 11392 (2010)** [dissent] [Editor's Note: The Board's decision was appealed to superior court under Kitsap County Cause No. 11-2-00103-4.]

Standard of review – See **STANDARD OF REVIEW** Vocational rehabilitation determinations

Time loss compensation (RCW 51.32.095(3))

A worker cannot, as a matter of law, receive time loss compensation benefits under RCW 51.32.095(3) unless he is undergoing a formal program of vocational rehabilitation. **....David Potts, 88 3822 (1989)**

WAGES (RCW 51.08.178) – COMPENSATION

Loss of Earning Power

Loss of earning power benefits received at the time of injury are not wages for the purpose of calculating time-loss compensation benefits. **....Eva Sadecki, 06 11468 (2007)** *[Editor's Note: The Board's decision was appealed to superior court under Yakima County Cause No.07-2-02111-5]*

WAIVER OF BENEFITS (RCW 51.04.060)

(See COVERAGE AND EXCLUSIONS and PENALTIES)

WILLFUL MISREPRESENTATION

(See Fraud)

WISHA

(See SAFETY AND HEALTH)

WORKER

(See EMPLOYER-EMPLOYEE and INDEPENDENT CONTRACTORS)